Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

FORD MOTOR COMPANY,
Petitioner

-v-

WILLIAM FRANKLIN FULKERSON, PAULINE FULKERSON, ALLSTATE INSURANCE COMPANY and MELINDA HERRENSMITH, Individually, as Mother of Troy E. Cilone, Infant, and as Administratrix of the Estate of Troy E. Cilone, Deceased

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On Petition For Writ of Certiorari
To The Kentucky Court of Appeals

PETITION FOR WRIT OF CERTIORARI

JOHN M. THOMAS
Office of the General Counsel
Ford Motor Company
Suite 1500
Parklane Towers West
Dearborn, MI 48126
(313)337-2515

MALCOLM E. WHEELER*
Parcel, Mauro, Hultin & Spaanstra, P.C.
Suite 3600
1801 California Street
Denver, CO 80202
(303)292-6400

Counsel for Petitioner
**Counsel of Record*

101 pp

QUESTIONS PRESENTED

1. Whether argument of counsel is a constitutionally adequate substitute for a punitive damage jury instruction required by the Due Process Clause of the Fourteenth Amendment.

2. Whether the Due Process Clause of the Fourteenth Amendment permits "bare-bones" punitive damage jury instructions that provide no meaningful guidance to the jury in assessing punitive damages, particularly in a jurisdiction with highly deferential judicial review designed to assure that almost all jury verdicts will be affirmed.

3. Whether, in states where the jury is given only "bare-bones" instructions on punitive damages, and where trial and appellate courts are nevertheless required to defer to the jury's determinations, the Due Process Clause of the Fourteenth Amendment requires proof of a punitive damage claim by clear and convincing evidence.

RULE 29.6 STATEMENT

Ford Motor Company has no parent corporation. The following is a list of domestic and foreign companies in which Ford Motor Company owns an equity interest of at least 10 % but less than 100 %:

Ford Latin-American Holdings, Inc.
Dobco Life Insurance Company
Ford Holdings
Great Mall of the Bay Area Management Company

Argentina
- Autolatina Argentina S.A.
- Invercred Compania Financiera S.A.

Australia
- Ford Motor Company of Australia Limited

Belgium
- Ford Credit N.V.
- Ford Motor Company (Belgium) N.V.
- Axus, S.A.

Brazil
- Apolo - Administradora de Bens S/C Ltda.
- Autolatina S.A.
- FB Empreendimentos S.A. (formerly Ford Brasil S.A.)
- Inter-Locadora S/A

Canada
- TCG, International

Denmark
- Ford Motor Company A/S

Finland
- Oy Ford Ab

Germany
- Ford Werke-Aktiengesellschaft & Co. Leasing KG

Holland

Ford Nederland B.V.

Netherlands

Ford Credit B.V.

Norway

Ford Motor Norge A.S.

New Zealand

Ford Motor Company of New Zealand Limited

Singapore

Ford Motor Company Private Limited

Spain

Ford Administracion I, S.A. (formerly Ford Credit Entidad de Financiacion, S.A.)

Sweden

Ford Motor Company Aktiebolag

Switzerland

Ford Motor Company (Switzerland) S.A.

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OPINION BELOW

The opinion of the Kentucky Court of Appeals (App. 1a-10a) is unreported.

BASIS FOR JURISDICTION

The decision of the Kentucky Court of Appeals was rendered on March 17, 1995. (App. 1a.) A timely motion for rehearing was denied on May 19, 1995. (App. 13a.) A timely motion for discretionary review by the Kentucky Supreme Court was denied on January 10, 1996. (App. 14a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. The Alleged Product Defect.

The punitive damage award in this product liability case—which has been tried twice with dramatically different results—arises out of a two-vehicle accident that occurred between 3:00 and 4:00 a.m. on June 2, 1985. Troy Cilone, who had not slept for almost 24 hours, was driving a 1984 Ford Ranger pickup truck on a two-lane road. (TAPE No. 11; 01/20/93; 16:25:19.)[1] His vehicle crossed the centerline and collided with a truck being driven in the opposite direction by William Fulkerson. The closing speed was between 80 and 90 mph. (TAPE No. 11; 01/20/93;

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[1] The videotape of the trial constitutes the official record in this case. Excerpts from an unofficial transcript are included in the appendix. (App. 21a-34a.)

16:19:55.) Cilone was killed, and Fulkerson was seriously injured. After the accident, the Ranger's left front wheel was found some distance away from the rest of the vehicle. Substantial physical evidence showed that the wheel had been torn off *during* impact. (E.g., TAPE No. 4; 01/08/93; 09:41:45; TAPE No. 9; 01/15/93; 11:35:26.)

In fact, at the first trial, the jury found that the accident was not caused by a defect of any kind. However, when the original verdict was overturned on appeal and the case was tried a second time, Plaintiffs (Cilone's mother, Cilone's estate, Fulkerson, and Fulkerson's wife) again claimed that the Ranger's wheel had fallen off *before* impact because of a failure of the "shrink-fit" joint that binds the wheel's spindle stem to the spindle body.[2]

B. The Complete Absence Of Any Prior Similar Accident.

The shrink-fit joint was originally developed for 1973 full-size Ford F-series pickups. (TAPE No. 4; 01/08/93; 11:10:33.) Larry Bihlmeyer, Plaintiffs' expert and a former Ford engineer who claimed to have been involved in this development process, admitted that F-series trucks had been tested extensively and that "we didn't expect" the shrink-fit joint to fail. (TAPE No. 4; 01/08/93; 13:30:50 and 11:10:15.) In fact, by 1982 the shrink-fit process had been used in F-series trucks for almost ten years, and there was no evidence that *any* shrink-fit joint in *any* F-series truck had *ever* failed under *any* circumstances. Further, before introducing the Ranger in 1982, Ford conducted over two million miles of additional rough-road durability and

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[2] During the "shrink fit" process, the spindle body is heated so that its bore hole expands. The spindle stem is then inserted into the bore hole, and the assembly is quenched so that the spindle body contracts around the spindle stem. (TAPE No. 4; 01/08/93; 11:07:15.)

smooth-road testing. (TAPE No. 10; 01/19/93; 09:42:02.) In the course of that pre-production testing, there was *no* report that *any* shrink-fit joint on *any* Ranger truck *ever* failed. (TAPE No. 10; 01/19/93; 09:43:04.)

Bihlmeyer also conceded that *every* shrink-fit joint in *every* production Ranger is "proof-tested" to make sure the shrink fit is proper. (TAPE No. 4; 01/08/93; 13:19:44 and TAPE No. 5; 01/11/93; 09:50:05 and 13:59:40.) A longitudinal force of 17,400 pounds—ten times greater than the highest forces measured in Ford's rough-road durability testing—is applied to *every* spindle assembly, and the assembly is rejected if any movement of the stem is detected. (TAPE No. 5; 01/11/93; 13:59:40 and 10:57:48; TAPE No. 8; 01/14/93; 16:06:49 and 16:14:44; TAPE No. 10; 01/19/93; 16:43:17.) Even further, Bihlmeyer conceded that Ford also conducts periodic "push-out" testing to ensure that the minimum strength of the shrink-fit joint is 23,600 pounds, 35% greater than the 17,400 pound proof-test force. (TAPE No. 5; 01/11/93; 13:59:52.) As Bihlmeyer explained, "[E]very 90 days they take five parts or so many and they physically ram out the stem, so they destroy the part, but they measure the load ... and that has to be [23,600] pounds or greater." (TAPE No. 5; 01/11/93; 14:01:07.) Bihlmeyer expressly conceded, "Everything is set up so that it *never* goes below [23,600] pounds." (TAPE No. 5; 01/11/93; 14:00:44 and 14:11:42 (emphasis added).) There is no evidence that these redundant testing processes *ever* failed to identify and reject *any* inadequate shrink-fit joint.

Ford sold about 2.8 million 1982-1984 Ranger vehicles with 5.6 million front shrink-fit joints. (TAPE No. 10; 01/19/93; 15:21:42.) There is no evidence that *any* of

these joints *ever* failed before impact under *any* circumstances, either before or after the accident in this case.[3]

C. Plaintiffs' Punitive Damages Theory: Because Ford Made Its Product Safer, It Therefore Knew Of A Safety Hazard.

Plaintiffs claimed that punitive damages were warranted because Ford "knew" the shrink-fit assembly was a "safety hazard." (TAPE No. 4; 01/08/93; 13:56:30.) At trial, Plaintiffs pointed to no test, no accident, and no shrink-fit failure of any kind to support that claim. Instead, they relied on the fact that Ford had implemented a 1985 design change to the shrink-fit assembly. (TAPE No. 4; 01/08/93; 13:56:30 and 13:48:56.) According to Bihlmeyer, this design change added a secondary retention feature that would keep the wheel on the spindle body even if the shrink-fit joint failed. This change, according to Bihlmeyer, demonstrated that Ford had discovered that the shrink-fit joint was "insufficient by itself" and that Ford "quietly" tried to cover up the danger without warning prior owners. (TAPE No. 4; 01/08/93; 13:56:30 and 13:48:56.)

D. Ford's Due Process Challenge To The Punitive Damage Jury Instruction.

1. Ford's due process objections prior to and during trial. Prior to trial, Ford moved for dismissal of Plaintiffs' punitive damages claim because Kentucky common law standards for the award of punitive damages were insufficient to satisfy the Due Process Clause of the

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[3] In its opinion, the Kentucky Court of Appeals inexplicably stated that "Ford knew of other incidents in which the shrink fit assembly failed." (App. 6a.) When Plaintiffs later made this same claim in their response to Ford's motion for discretionary review, Ford moved to strike this portion of their response as unsupported by the evidence. The Kentucky Supreme Court granted Ford's motion. (App. 14a.)

Fourteenth Amendment as interpreted in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991)("*Haslip*"). (App. 15a-20a.) Ford's motion was denied. (App. 21a.) At trial, Ford moved for a directed verdict on punitive damages on these same grounds, both at the close of the Plaintiffs' case and at the close of all the evidence. (App. 21a-24a.) These motions, too, were denied. (App. 22a, 24a.)

Ford made the same constitutional objections to Kentucky's "traditional" punitive damage instruction. (App. 25a.) Ford also requested jury instructions that would have informed the jury, among other things, (1) that Plaintiffs were required to prove their punitive damage claim by clear and convincing evidence; (2) that, in determining the appropriate amount of punitive damages, the jury should consider various factors, including the likelihood of serious harm and Ford's awareness of that likelihood, whether Ford profited from its conduct, Ford's efforts to remedy the alleged defect, and the amount of compensatory damages; (3) that a defendant's wealth should play no part in determining the amount of punitive damages; and (4) that punitive damages should be awarded, if at all, only in an amount necessary for the purposes of punishment and deterrence and not for any other purpose. (App. 25a, 35a-38a.)

The trial court rejected all of Ford's proposed instructions because it believed Kentucky practice permitted only "bare-bones" instructions. (App. 25a.) The trial court then gave the following punitive damage instruction, and no other:

> If you find for [Plaintiffs] against Ford Motor Company under Instruction One, and if you are further satisfied from the evidence that the accident was caused by gross negli-

> gence on the part of Ford Motor Company, you may in your discretion award punitive damages against Ford Motor Company in addition to the damages otherwise authorized under these instructions in an amount at the discretion of the jury. If you award punitive damages, you will state the amount separately from the sum or sums awarded under any other instruction, and you may use Verdict Form G for this purpose.
>
> "Gross negligence" means a wanton or reckless disregard for the lives and safety of other persons, including the plaintiffs, or a wilful or malicious act.

(App. 30a.) This "bare-bones" instruction—to which Ford once again objected (App. 26a)—gave the jury unbridled license to determine whether to award punitive damages for gross negligence and, if so, the amount of punitive damages. The instruction provided literally no constraint on and no guidance for the jury's exercise of those powers. The instruction did not even inform the jury of the purposes of punitive damages.

2. Ford's post-verdict motions. The jury returned a verdict in excess of $6.3 million, including $4 million in punitive damages.[4] Ford moved for a new trial, again

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[4] The jury awarded $1,049,751 in compensatory damages to Cilone's mother and estate and $1,299,274 to Fulkerson and his wife. By prior stipulation of the parties, Intervening Plaintiff Allstate Insurance Company was awarded $10,379 to reimburse it for insurance payments made in connection with the accident. Under Kentucky law, reversal of the punitive award would require reversal of these compensatory awards as well. *See Pedigo v. Carey*, 650 S.W.2d 256, 258 (Ky. 1983)(new trial on all issues required where there is a genuine question on liability and retrial on damages alone would cause injustice).

arguing that the trial court's punitive damages instruction was insufficient under due process and under *Haslip*. (App. 39a-41a.) The trial court denied Ford's motion because the punitive damages instruction "followed exactly instructions given in almost identical cases which were sustained by the [Kentucky] Supreme Court." (App. 12a.)

3. Ford's appeal to the Kentucky Court of Appeals. On appeal to the Kentucky Court of Appeals, Ford once again argued that the trial court's instruction was inadequate under due process and under *Haslip*. Among other things, Ford argued that the instruction was inadequate because (1) it did not require clear and convincing evidence to support Plaintiffs' claims; (2) it gave the jury discretion to determine the amount of punitive damages but failed to provide any guidance for the jury in exercising that discretion; and (3) it even failed to advise the jury of the purposes of punitive damages. (App. 42a-48a.)

The court of appeals affirmed without referring to *Haslip* or to due process. (App. 7a-8a.) The court suggested that clear and convincing evidence, and instructions on the factors that should guide the jury's exercise of discretion, were not required under Kentucky law because Kentucky's 1988 punitive damage statute (which requires clear and convincing evidence and detailed instructions on relevant factors) did not apply to the 1987 accident in this case. (App. 8a.) The court agreed that "Kentucky requires" instructions on the purposes of punitive damages, but it held that this requirement had been met in this case because Ford's counsel, in closing argument, had informed the jury of those purposes. (App. 7a-8a.) As the court explained, "[T]he punitive damage instruction submitted to the jury, *supplemented by counsel's closing arguments*, met the 'bare bones' requirements of Kentucky." (App. 8a, emphasis added.)

4. Ford's petition for rehearing. Ford petitioned for rehearing. (App. 49a-53a.) Ford pointed out that the issue was not whether the punitive damages instruction satisfied Kentucky's "bare-bones" requirements, but whether it satisfied the Due Process Clause of the Fourteenth Amendment to the United States Constitution as interpreted in *Haslip*. (App. 51a.) Further, Ford argued, the court could not rely on counsel's argument to cure the federal constitutional deficiencies in the instruction because, under *Taylor v. Kentucky*, 436 U.S. 478 (1978)("*Taylor*"), and *Carter v. Kentucky*, 450 U.S. 288 (1981)("*Carter*"), arguments of counsel cannot substitute for instructions required by due process. (App. 51a-53a.) The court of appeals denied Ford's petition without attempting to reconcile its decision with *Haslip*, *Taylor*, or *Carter*. (App. 13a.)

5. Ford's Motion for Discretionary Review. Ford then sought discretionary review from the Supreme Court of Kentucky. (App. 54a-60a.) Once again, Ford argued that the jury instruction was insufficient under due process and under *Haslip* because it did not require clear and convincing evidence, because it failed to give the jury any guidance of any kind in exercising its discretion to determine the amount of punitive damages, and because it failed even to advise the jury of the purposes of punitive damages. (App. 54a-60a.) Once again, Ford argued that the decision of the Court of Appeals was in direct conflict with the decisions in *Haslip*, *Taylor*, and *Carter*. (App. 57a-58a.) Nevertheless, on January 10, 1996, the Kentucky Supreme Court denied discretionary review. (App. 14a.)

REASONS FOR GRANTING THE WRIT

There are three compelling reasons for granting certiorari in this case: (1) The Kentucky Court of Appeals decision conflicts with and effectively flouts this Court's

decisions in *Haslip*, *Taylor*, and *Carter*; (2) this case squarely raises the constitutional adequacy of punitive damage jury instructions, the most important of the three due process components identified in *Haslip*, the only one that this Court has not addressed after *Haslip*, and one that has resulted in a conflict in the Circuits; and (3) this case squarely raises an issue left open by *Haslip*—namely, the constitutionality of a "preponderance of the evidence" standard to support a punitive damage award in a system that permits only "bare-bones" jury instructions and highly deferential judicial review, without the "full panoply" of procedural protections approved in *Haslip*.

I. THE KENTUCKY COURT OF APPEALS' DECISION SO PLAINLY CONFLICTS WITH THIS COURT'S DECISIONS IN *HASLIP*, *TAYLOR*, AND *CARTER* THAT SUMMARY REVERSAL ON THE MERITS WOULD BE APPROPRIATE.

This Court's decisions in *Haslip*, *Taylor*, and *Carter* are plainly controlling in this case, but the Kentucky Court of Appeals inexplicably disregarded all three of those decisions. By doing so, it has provided the first compelling reason for granting Ford's petition: Any other result would allow state courts, relying on the daunting odds against a grant of certiorari, to flout this Court's controlling decisions with impunity.

Under *Haslip*, punitive damage jury instructions can satisfy the Fourteenth Amendment's Due Process Clause, even though they give the jury significant discretion, only if that discretion is "exercised within reasonable constraints." 499 U.S. at 20. In *Haslip*, the jury was instructed that the purpose of punitive damages was "to allow money recovery to the plaintiffs ... by way of punishment to the defendant and for the added purpose of protecting the public by

detering [sic] the defendant and others from doing such wrong in the future." *Id.* at 6 n.1. The instructions further admonished the jury to "take into consideration the character and the degree of the wrong" and "not to [use punitive damages to] compensate the plaintiff for any injury." *Id.* And the instructions emphasized that the jury was not required to award any punitive damages. *Id.* This Court approved those instructions because the jury's discretion was "not unlimited" and was properly "confined to deterrence and retribution, the state policy concerns sought to be advanced." 499 U.S. at 19.

In this case, in sharp contrast, the Kentucky Court of Appeals approved a punitive damage instruction that gave the jury unfettered license to award punitive damages in any amount for any reason or for no reason at all. The instruction imposed literally no constraint on and gave no guidance for the jury's exercise of that discretion. The instruction did not even inform the jury that the purposes of punitive damages were punishment and deterrence, much less inform the jury of the meaning of those terms or the limitations inherent in those doctrines.

Even further, the Kentucky Court of Appeals gave only one reason for approving this plainly unconstitutional jury instruction: Ford's counsel had "supplemented" the instruction by informing the jury of the purposes of the punitive damages in closing argument. (App. 8a.) But this Court has *twice* informed Kentucky courts that "arguments of counsel cannot substitute for instructions by the court" that are required by due process. *Taylor*, 436 U.S. at 488-89; *Carter*, 450 U.S. at 304.

In *Taylor*, a Kentucky trial court failed to instruct the jury that the criminal defendant was presumed to be innocent. On appeal, the Kentucky Court of Appeals "rejected petitioner's presumption-of-innocence contention

by citing Kentucky case law." 436 U.S. at 482-83. When the Kentucky Supreme Court denied discretionary review, this Court granted certiorari and held that the presumption-of-innocence instruction was required by the Due Process Clause of the Fourteenth Amendment. *Id.* at 490. This Court expressly considered and rejected Kentucky's argument that the instruction was not required because defense counsel had addressed the issue in closing argument:

> The Commonwealth also contends that no additional instructions were required, because defense counsel argued the presumption of innocence in both his opening and closing statements. But arguments of counsel cannot substitute for instructions by the court ... . It was the duty of the court to safeguard petitioner's rights, a duty only it could have performed reliably.

Id. at 488-89.

In *Carter*, the Kentucky trial court once again refused to give an instruction required by the Fourteenth Amendment's Due Process Clause (i.e., an instruction that the criminal defendant's failure to testify should not prejudice him).[5] The Kentucky appellate courts affirmed, once again relying on Kentucky law. This Court reversed, once again holding that argument of counsel was insufficient to satisfy the trial court's "constitutional obligation":

> And most certainly, defense counsel's own argument [on the defendant's right not to testify] cannot have had the purging effect

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[5] The holding in *Carter* was based ultimately on the Fifth Amendment's privilege against self-incrimination, which was applicable to the states only through the Fourteenth Amendment. *Carter*, 450 U.S. at 288.

> that an instruction from the judge would have had. "[A]rguments of counsel cannot substitute for instructions by the court."

450 U.S. at 304.[6]

Thus, the conflict between the Kentucky Court of Appeals' decision and this Court's decisions in *Haslip*, *Taylor*, and *Carter* is so manifest and inexcusable that certiorari is warranted. In fact, summary reversal on the merits would be appropriate—except that, as discussed immediately below, the issue of meaningful punitive damage instructions is so important that it merits plenary review.[7]

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[6] *Taylor* and *Carter*, unlike this case, were criminal cases. With respect to whether arguments of counsel are an adequate substitute for an instruction required by due process, this distinction is irrelevant. This is particularly true in this case because punitive damages "share key characteristics of criminal sanctions." *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1487 (1994). Even in civil cases where punitive damages are not at issue, federal courts uniformly recognize that "closing arguments of counsel are not to be relied upon as a substitute for proper jury instructions." *Alloy Int'l Co. v. Hoover-NSK Bearing Co.*, 635 F.2d 1222, 1226 (7th Cir. 1980); *accord, e.g., Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1262 (10th Cir. 1995); *Hallberg v. Brasher*, 679 F.2d 751, 757 n.7 (8th Cir. 1982).

[7] If this Court should decide not to grant plenary review, summary reversal on the merits is imperative to avoid an even greater injustice than has already occurred. If certiorari is denied, Ford will not simply be forced to satisfy an unconstitutional punitive damages judgment. Rather, it will *also* be fined more than $600,000 for daring to ask the Kentucky Supreme Court to correct a patent violation of Ford's constitutional rights, a violation that should have been corrected by the Kentucky Court of Appeals in the first instance. *See* Ky. Rev. Stat. § 26A.300 (imposing damages of 10% on an unsuccessful appellant in the Kentucky Court of Appeals who unsuccessfully seeks review by the Kentucky Supreme Court); *Ash v. Security Nat'l Ins. Co.*, 574 S.W.2d 346 (Ky. App. 1978).

II. THE KENTUCKY COURT OF APPEALS' DECISION RAISES IMPORTANT ISSUES OF FEDERAL CONSTITUTIONAL LAW THAT WARRANT PLENARY REVIEW.

There are compelling reasons to grant certiorari even apart from the Kentucky Court of Appeals' inexplicable failure to acknowledge this Court's authority. In *Haslip*, this Court's analysis of Alabama's system for awarding punitive damages focused on three components of due process: (1) jury instructions, (2) post-verdict judicial review by trial and appellate courts; and (3) the size of the award. Since *Haslip*, this Court has granted certiorari to address the latter two components in detail. *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994)(post-verdict judicial review); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993)(size of award); *BMW of N. Am., Inc. v. Gore*, 115 S. Ct. 932 (1995)(certiorari granted to review size of award). But this Court has yet to grant certiorari in a case squarely raising the adequacy, under the Due Process Clause, of punitive damage jury instructions. It is important that this Court do so, because adequate jury instructions are the principal safeguard against arbitrary punitive damage awards in most jurisdictions where, as in Kentucky, "[t]he sanctity of the jury verdict is at the heart of our judicial system." *Hanson v. American Nat'l Bank & Trust Co.*, 865 S.W.2d 302, 311 (Ky. 1993).

A. Due Process Does Not Permit "Bare-Bones" Jury Instructions That Provide Juries With No Guidance In Assessing Punitive Damages, Particularly When Highly Deferential Judicial Review Assures That Almost All Jury Verdicts Will Be Affirmed.

Certiorari is warranted in this case, just as it was in *Oberg*, *TXO*, and *Gore*. *Oberg* presented an extreme example of a state's failure to provide adequate judicial review; *TXO*

and *Gore* presented what seem to be extreme examples of disproportionately large punitive awards; and this case presents an extreme example of "bare-bones" jury instructions that fail to provide any meaningful guidance to juries charged with assessing punitive damages.[8]

The jury instructions approved in *Haslip*, while not detailed, at least informed the jury of the purposes of punitive damages.[9] Moreover, this Court approved those instructions in the context of a system that *excluded* evidence of the defendant's wealth and that *also* provided for unusually thorough "substantive standards" of trial court and appellate review. 499 U.S. at 20-23. In fact, Alabama courts were permitted or obliged to "review facts, take new evidence, find additional facts, and actually adjust jury awards of punitive damages." *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1414 (4th Cir. 1992); *see Haslip*, 499 U.S. at 20-23. As this Court

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[8] Most courts, unlike Kentucky courts, require instructions that at least inform juries of the purposes of punitive damages (almost uniformly punishment and deterrence), but in many courts that is the *only* guidance juries are given in assessing punitive damages—except perhaps for an instruction to consider the defendant's wealth. *E.g.*, *Klein v. Grynberg*, 44 F.3d 1497 (10th Cir.), *cert. denied*, 116 S. Ct. 58 (1995)(purposes only); *Brown v. Petrolite Corp.*, 965 F.2d 38 (5th Cir. 1992)(purposes only); *Jacobs Mfg. Co. v. Sam Brown Co.*, 19 F.3d 1259 (8th Cir.), *cert. denied*, 115 S. Ct. 487, *and cert. denied*, 115 S. Ct. 1251 (1994)(purposes only); *E. J. McKernan Co. v. Gregory*, 623 N.E.2d 981 (Ill. App. 1993)(purposes only); *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464 (Mo. 1995)(purposes only); *Rodebush by & Through Rodebush v. Oklahoma Nursing Homes*, 867 P.2d 1241 (Okla. 1993)(purposes plus wealth only); *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991)(purposes and ability to pay only); *Spence v. Howell*, 890 P.2d 714 (Idaho 1995)(purposes only).

[9] The jury in *Haslip* was also instructed that the purpose of punitive damages was "not to compensate the plaintiff for any injury," that it was not required to award punitive damages, and that, in fixing the amount of punitive damages, it should take into consideration "the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." 499 U.S. at 6 n.1. The jury in this case was not given *any* of these instructions.

emphasized, Alabama thus provided a "full panoply of ... procedural protections." *Id.* at 23.

While the Alabama jury instructions approved in *Haslip* are similar to those typically given elsewhere, Alabama's "full panoply" of other procedural protections are not. *See Johnson*, 974 F.2d at 1414. For example, far from excluding evidence of wealth, many courts affirmatively instruct juries to consider a defendant's wealth.[10] Further, the almost *de novo* judicial review of jury awards approved in *Haslip* is not available in federal courts under Fed. R. Civ. P. 50(b) or 59, and it may not be permissible under the Seventh Amendment. *E.g.*, *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991). Indeed, the Fifth Circuit has succinctly summarized the very narrow scope of review available in federal courts:

> The calculation of an appropriate amount of punitive damages is traditionally left to the unique discretion of the factfinder. ... Accordingly, in reviewing the constitutionality of an award of punitive damages, a court may not explicitly or implicitly recalculate the award of damages; moreover, it may not express an opinion whether the award is too high or too low. Rather, the court may only consider whether the circumstances of the case offer some support for the amount of the award.

Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377, 1382 (5th Cir. 1991).[11] Most states similarly accord considerable

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[10] See footnote 8, above.

[11] *Accord, e.g., Klein v. Grynberg*, 44 F.3d 1497, 1504 (10th Cir.), *cert. denied*, 116 S. Ct. 58 (1995)(jury verdict will not be reversed unless it is "so excessive that i[t] shocks the judicial conscience or leads to the inescap-

(continued)

deference to the jury's verdict because, as the Kentucky Supreme Court has explained, "[t]he sanctity of the jury verdict is at the heart of our judicial system." *Hanson v. American Nat'l Bank & Trust Co.*, 865 S.W.2d 302, 311 (Ky. 1993).[12] Thus, except in rare circumstances, most

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able inference that it resulted from improper passion or prejudice"); *Benny M. Estes & Assoc. Inc. v. Time Ins. Co.*, 980 F.2d 1228 (8th Cir. 1992)(jury verdict will not be reversed unless it is so grossly excessive as to shock the court's conscience); *Vasbinder v. Scott*, 976 F.2d 118 (2d Cir. 1992)(same). This Court has granted certiorari to consider the appropriate standard of review to be used by a federal court in reviewing an award of compensatory damages for excessiveness. *Gasperini v. Center for Humanities*, 116 S. Ct. 805 (1996).

[12] *Accord, e.g., E. J. McKernan Co. v. Gregory*, 623 N.E.2d 981, 998 (Ill. App. 1993)(amount of punitive damages is a "matter for the discretion of the jury" and will not be reversed "unless it is the result of passion, partiality, or corruption"); *Carpenter v. Chrysler Corp.*, 853 S.W.2d 346 (Mo. App. 1993)(court will disturb jury's award only if award is product of bias or prejudice); *Dow Chem. Co. v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 553 N.E.2d 144, 151 (Ind. App. 1990)(court will reverse an award of punitive damages "only when the amount assessed appears to be so outrageous as to impress the court at first blush with its enormity."); *Rhue v. Dawson*, 841 P.2d 215, 230 (Ariz. App. 1992)("Appellate courts will not interfere with the jury verdict on damages unless the verdict is not supported by the evidence ... or unless it is 'so outrageously excessive as to suggest, at first blush, passion or prejudice.'"); *McNair v. McNair*, 870 S.W.2d 756, 761 (Ark. 1994)("Remittitur is within the inherent power of the court if an award is grossly excessive or appears to be the result of passion or prejudice."); *Sommer v. Gabor*, 48 Cal. Rptr. 2d 235, 245 (Cal. App. 1995)("It is well settled that damages are excessive only where the recovery is so grossly disproportionate to the injury that the award may be presumed to have been the result of passion or prejudice."); *General Motors Corp. v. Moseley*, 447 S.E.2d 302, 315 (Ga. App. 1994)("The size of an award of punitive damages is generally left to the 'enlightened conscience' of the jury, and the jury's award will not be disturbed on appeal unless it is so excessive or inadequate as to shock the 'judicial conscience.'"); *Sessums v. Northtown Limousines*, 664 So. 2d 164, 170 (Miss. 1995)("the jury's award of punitive damages will be reversed 'only where it is so excessive that it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience of the court.'"); *Maul v. Kirkman*, 637 A.2d 928, 940 (N.J. Super. 1994)("appellate court review of any punitive damage award is carefully circumscribed. We may set aside an award only if it is 'so excessive as irresistibly to give rise to the inference of mistake, passion, prejudice or partiality; or [is] so disproportionate as to shock the conscience; (continued)

courts in most jurisdictions are required to accord considerable deference to the jury's assessment of the proper amount of punitive damages—even though the jury makes that assessment "with nearly absolute discretion to enter any amount of punitive damages it deems 'appropriate to punish and deter.'" *Johnson*, 974 F.2d at 1415.

The constitutional adequacy of "bare-bones" punitive damage instructions, when combined with highly deferential judicial review and the absence of the "full panoply" of other procedural safeguards present in *Haslip*, has already spawned a conflict among the circuits. In *Mattison*, 947 F.2d at 100, the jury was simply instructed to consider the defendant's net worth in assessing punitive damages in "such sum as you believe will serve to punish that defendant and deter it and others from like conduct." Because the broad discretion thus given to the jury was not adequately checked by deferential court review under Rules 50(b) and 59, the Fourth Circuit concluded that the awards of punitive damages violated due process. *Mattison*, 947 F.2d at 100. Subsequently, the decision in *Mattison* was approved and applied by the Fourth Circuit sitting *en banc*. *Johnson*, 974 F.2d at 1414-18.

In *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993), however, the Third Circuit reached the opposite conclusion. In *Dunn*, the jury instructions were virtually identical to those in *Mattison* and *Johnson*; the only guidance given the jury in fixing the

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or the sustaining of the award would result in a manifest denial of justice.'"); *Beverley v. Choices Women's Medical Ctr., Inc.*, 565 N.Y.S.2d 833, 834, (App. Div.), *aff'd*, 587 N.E.2d 275 (N.Y. 1991) ("An award of damages should not be disturbed unless it shocks the conscience of the court ... ."); *Doe v. White*, 647 N.E.2d 198, 204 (Ohio App. 1994)("The determination of the amount of punitive damages is within the discretion of the trier of fact, and the award will not be disturbed unless it is shown to be the result of passion and prejudice.").

amount of punitive damages was an instruction that a punitive award should "sting" the defendant and "act as a deterrent to such conduct by the defendant in the future and a warning to others." *Id.* at 1380. Nevertheless, the Third Circuit found *Mattison* "unpersuasive" and approved the instructions because "post-trial review under Rules 50 and 59 and federal appellate review ... provide sufficient constraint on a jury's discretion to satisfy the requirements of due process." *Id.* at 1381.

This case provides an ideal opportunity for this Court to resolve this conflict, because it squarely raises the adequacy of "bare-bones" punitive damage instructions in a system that, like the federal system, permits only deferential judicial review. Ford objected to the punitive damage instruction given by the trial court *and* proposed jury instructions that would have given the jury substantial guidance in a number of critical areas. If Ford's proposed instructions had been given, the jury would have received guidance regarding the significance of, for example, (1) the absence of any competent evidence that Ford profited from its design of the shrink-fit assembly,[13] (2) the fact that the $2.3 million compensatory award alone eliminated even the alleged profit to Ford, (3) the highly remote nature of the risk, as demonstrated by Ford's extensive pre- and post-production testing program, as well as the complete absence of any other shrink-fit failures notwithstanding 5.6 million Ranger shrink-fit joints in use for more than a decade; and (4) the design changes made by Ford and intended, accord-

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[13] Bihlmeyer calculated a "profit" of $2 million by assuming that the redesigned spindle assembly with the secondary retention feature was more expensive simply because it was heavier. But common experience shows that smaller and lighter products (e.g., laptop computers) are often more expensive than larger, heavier products.

ing to Plaintiffs' own expert, to make the Ranger's shrink-fit assembly even safer.

In fact, those design changes were Plaintiffs' *only* evidence that Ford should be punished because it knew of a "safety hazard" associated with the shrink-fit joint. Therefore, if the jury in this case simply had been instructed, as Ford requested, to award punitive damages only as "necessary to impose *appropriate* punishment and deterrence," the jury could not have assessed punitive damages without first considering the fact that *any* award of punitive damages would effectively punish Ford for having made its product safer, and would deter others from doing the same.

Thus, the jury's $4 million punitive award is nothing short of perverse when compared to the conduct it is designed to punish and deter, and it vividly justifies this Court's expressed concern that "unlimited jury discretion ... in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." *Haslip*, 499 U.S. at 18. In Kentucky, as in most courts, judicial review of jury verdicts is highly deferential, and meaningful jury instructions are the principal safeguard against such extreme and unconstitutional results. Those safeguards were entirely lacking in this case, and they are almost entirely lacking in many other courts in many other states. Therefore, there is a compelling need for this Court to address the due process requirements for those important safeguards.

B. Absent The Substantive Judicial Review And The "Full Panoply" Of Other Procedural Protections Approved In *Haslip*, And With "Bare-Bones" Instructions, Due Process Requires Proof Of A Punitive Damage Claim By Clear And Convincing Evidence.

In this case, due process also required that liability for punitive damages be proved by clear and convincing

evidence and not, as the jury was instructed over Ford's objection, by a mere preponderance of the evidence. This is particularly true if the "bare-bones" instruction given to the jury in this case somehow passes constitutional muster.

In a footnote in *Haslip*, this Court ruled that a burden of proof less than clear and convincing evidence was constitutionally sufficient "when buttressed, as it is, by the procedural and substantive protections" provided by Alabama's system of trial court and appellate review. 499 U.S. at 23 n.11. But, as discussed above, Alabama's full panoply of safeguards and system of almost *de novo* judicial review is far from typical. In Kentucky, as in most state and federal courts, trial judges and appellate courts are generally required to defer to the jury's determination of the amount of punitive damages. In fact, this Court has previously rejected the argument that deferential judicial review can be a "curative for an inadequate burden of proof." *Santosky v. Kramer*, 455 U.S. 745, 757 n.9 (1982). Thus, this case squarely presents an issue implicitly left open by *Haslip*.

"[T]he Court has engaged in a straightforward consideration of the factors identified in [*Mathews v.*] *Eldridge* [424 U.S. 319 (1976)] to determine whether a particular standard of proof in a particular proceeding satisfies due process." *Santosky*, 455 U.S. at 754. The relevant factors are the private interests affected by the proceeding, the risk of error created by the state's chosen procedure and the likelihood that a higher evidentiary standard would reduce that risk, and the countervailing governmental interest supporting use of the lower evidentiary standard. *Id.* at 754, 761. In this case, as in *Santosky*, "the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight." *Id.* at 758.

1. The private interests. This Court has required clear and convincing evidence "when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money,'" threatening "'a significant deprivation of liberty' or 'stigma.'" *Santosky* at 756, quoting *Addington v. Texas*, 441 U.S. 418, 424, 425, 426 (1979). The possibility of stigma weighs heavily in determining the procedural protection required by due process. In *In re Winship*, 397 U.S. 358, 363-64 (1970), for example, the probability that a person might lose his "good name" played a significant role in this Court's determination that proof beyond a reasonable doubt was required in criminal cases. *Cf. Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971)(due process required when state action would be viewed as "badge of disgrace"); *see generally* Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 278-84 (1983)(hereinafter "Wheeler").

A judgment for punitive damages imposes a significant stigma analogous to that associated with conviction of a crime. As this Court has recently recognized, "the very labels given 'punitive' or 'exemplary' damages, as well as the rationales supporting them, demonstrate that they share key characteristics of criminal sanctions." *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1487 (1994). Indeed, the federal statute at issue in *Landgraf* authorized punitive damages for "malice or reckless indifference" to federally protected rights, *Id.*, just as the jury instruction in this case authorized punitive damages for a "malicious act" or for "reckless disregard" for the lives and safety of other persons. Given this standard for the award of punitive damages, punitive damages by their very nature represent society's condemnation and necessarily jeopardize the defendant's good name, reputation, honor, and integrity. *See, e.g., IBEW v. Foust*, 442 U.S. 42, 48 (1979); *Haslip*,

499 U.S. at 54 (O'Connor, J. dissenting)("punitive damages are specifically designed ... to make clear that the defendant's misconduct was especially reprehensible.") In fact, the stigma associated with a finding of "wanton or reckless disregard" may well be greater than the stigma attached to conduct that is criminal without regard to fault. *See* Wheeler at 282-83.[14]

2. The risk of erroneous deprivation. "Imprecise substantive standards" and potential "cultural or class bias" creates a risk of erroneous decisions that weighs heavily in favor of an increased evidentiary standard. *Santosky*, 455 U.S. at 763. In *Oberg*, this Court expressly recognized that

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[14] The stigma attached to a punitive award can be just as permanent as the stigma attached to a criminal conviction. *See Santosky*, 455 U.S. at 758 (permanency of threatened loss is an important factor to consider in evaluating proper evidentiary standard). Almost two decades after a California jury assessed $125 million in punitive damages against Ford for the fuel system design of the Pinto, *see Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. App. 1981), Ford must *still* contend with repeated claims—in television programs, Sunday newspapers, testimony to Congress, and letters to the editor—that that verdict shows that Ford "knew" the Pinto was prone to explode in minor collisions but "didn't take it off the market until faced with ruinous lawsuits." *E.g.*, ABC World News Tonight, March 6, 1995, Transcript 5046 (available on LEXIS, NEWS Library, CURNWS file); Carl T. Bogus, *Tort 'Reform' Should Be Kept Out of Contract*, Palm Beach Post, July 16, 1995, at 1F; *Prepared Testimony of M. Stuart Madden Before the Senate Committee on Commerce, Science and Transportation*, April 4 1995 ("the public finding of rogue conduct can be as great a punishment ... as the monetary award," citing *Grimshaw* as an example); Letter, *Fort Lauderdale Sun-Sentinel*, January 14, 1996 (Ford "knew the Pinto had unsafe fuel tanks"). Ford must continue to contend with this stigma even though Ford was acquitted of any criminal conduct in connection with the Pinto; even though another jury subsequently found no defect of any kind in the Pinto design; and even though a leading tort scholar, after reviewing the matter, concluded that the public perception of the *Grimshaw* case is based on factual misconceptions that are so significant that "the case can properly be referred to as 'mythical.'" Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 Rutgers L. Rev. 1013 (1991).

these same factors create an "acute" risk of erroneous punitive awards:

> Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express their biases against big businesses, particularly those without strong local presences.

114 S. Ct. at 2340-41. As this Court also observed, "the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries." *Id.* at 2340.

The twin problems of imprecise substantive standards and juror bias is particularly acute in product liability personal injury cases based, as is this one, on alleged design defects. Virtually every product design poses some risk of injury, and there is widespread consensus today that a design is defective only if that risk outweighs the benefits of the product. *See generally* Restatement (Third) of Torts: Products Liability, § 2, comment c (Tentative Draft No. 2, March 13, 1995). But whether the risk of a design outweighs its benefits is a plainly subjective judgment on which reasonable people may often disagree. This subjectivity, combined with a mere preponderance of the evidence standard, may be tolerable when the issue is simply compensatory damages, but it creates an unacceptably high risk of erroneous punitive awards.[15] Where a jury in hindsight

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[15] This very case starkly illustrates the acute risk of arbitrary product liability verdicts. The jury at the first trial found that the Ranger was not defective *at all*, while the jury in the second trial found that it was so (continued)

finds that the risk outweighs the benefit, the manufacturer's knowledge of the risk is far too easily equated with "knowledge" of a "defect" and, therefore, with "reckless disregard" for safety. Moreover, the jury charged with making this judgment must do so in the context of a particular accident in which individual human beings have been seriously injured or killed by an aspect of the product's design, and where the overall benefits of the design to other people in other circumstances may seem remote and hypothetical.

This Court's decisions plainly recognize that a clear and convincing evidentiary standard can significantly reduce the risk of erroneous and arbitrary results. "Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate" results will be reached. *Addington*, 441 U.S. at 427; *see also Santosky*, 455 U.S. at 764-65; Wheeler at 296-98.

3. Governmental interests. The state, of course, has an interest in punishing and deterring wrongful conduct. But just as the state "has no interest in confining individuals involuntarily if they are not mentally ill," *Addington*, 441 U.S. at 426, it has no interest in imposing punishment for conduct that is not wrongful—and it certainly has no interest in punishing conduct that is socially responsible, such as making a safe product even safer. In fact, about half of the states that generally allow punitive damages already have adopted a higher standard of proof for punitive damages, either by statute or court decision, without apparent effect on their legitimate interests. *See* V.

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dangerously defective that Ford deserved to be punished with a $4 million fine. The principal difference between the two trials was that Ford's subsequent design change was excluded from evidence in the first trial, but admitted at the second.

Schwartz and M. Behrens, *Punitive Damage Reform—State Legislatures Can and Should Meet the Challenge Issued By the Supreme Court of the United States in Haslip*, 42 Am. U. L. Rev. 1365, 1381 n.99 (1993); *cf. Santosky*, 455 U.S. at 745 (considering fact that 35 other states already required higher evidentiary standard for termination of parental rights).

Further, "a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State." *Santosky*, 455 U.S. at 767. In fact, Kentucky demands clear and convincing evidence in proceedings of far less moment than punitive damages proceedings. For example, clear and convincing evidence is required by Kentucky common law to prove fraud, (*Investors Heritage Life Ins. Co. v. Colson*, 717 S.W.2d 840, 842 (Ky. App. 1986)); to overcome the presumption raised by a signed and delivered deed, (*Statewide Dev. Co. v. Lexington Fayette Urban County Gov't*, 821 S.W.2d 97, 100 (Ky. App. 1991)); to prove that property obtained during marriage is a personal gift, (*Browning v. Browning*, 551 S.W.2d 823, 825 (Ky. App. 1977)); and to prove an oral modification of a written contract, (*Wehr Constructors, Inc. v. Steel Fabricators, Inc.*, 769 S.W.2d 51 (Ky. App. 1988)). And Kentucky now requires clear and convincing evidence in punitive damages cases, as well. Ky. Rev. Stat. § 411.184. To paraphrase *Santosky*, 455 U.S. at 768, "[w]e cannot believe that it would burden the State unduly to require that its factfinders have the same factual certainty when [imposing punitive damages] as they must have to [prove that property obtained during marriage is a personal gift]."

Here, as in *Santosky*, 455 U.S. at 768, the "logical conclusion of this balancing process is that the 'fair preponderance of the evidence' standard ... violates the Due Process Clause of the Fourteenth Amendment." The jury should have

been permitted to assess punitive damages only upon clear and convincing evidence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOHN M. THOMAS
Office of the General Counsel
Ford Motor Company
Suite 1500
Parklane Towers West
Dearborn, MI 48126
(313)337-2515

MALCOLM E. WHEELER*
Parcel, Mauro, Hultin & Spaanstra, P.C.
Suite 3600
1801 California Street
Denver, CO 80202
(303)292-6400

Counsel for Petitioner

**Counsel of Record*

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NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 93-CA-1365-MR

FORD MOTOR COMPANY — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE EDWIN A. SCHROERING, JR.,
JUDGE
ACTION NO. 85-CI-6869

MELINDA HERRENSMITH
(Individually, as
Mother of Troy E. Cilone,
Infant, and as Administratrix
of the Troy E. Cilone Estate);
WILLIAM FRANKLIN FULKERSON;
PAULINE FULKERSON; and
ALLSTATE INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

BEFORE: EMBERTON, HUDDLESTON and McDONALD, Judges.

McDONALD, JUDGE. Ford Motor Company (Ford) appealed judgment of the Jefferson circuit Court which awarded $6,349,025 in damages to William Fulkerson, Pauline Fulkerson, Allstate Insurance Company and Melinda Herrensmith, mother of Troy Cilone. The judgment results from a second trial of a products-liability action. In the first trial, the jury found that the accident did not result from a design or manufacturing defect. On appeal, the Court of Appeals reversed and remanded on the grounds that the jury instructions were erroneous and the trial court erred in failing to admit evidence of a change in the product design. The Supreme Court affirmed the decision of this Court with instructions to admit the evidence of design change. *Ford Motor Company v. Fulkerson*, Ky., 812 S.W.2d 119 (1991).

The jury, in the second trial, found against Ford and awarded over six (6) million dollars in damages, including four (4) million dollars in punitive damages.

The facts of the case are easy to grasp. On June 2, 1985, seventeen-year-old Troy Cilone crossed the center lane in his 1984 Ranger, colliding with a 1972 pick-up truck driven by William Fulkerson. Cilone was killed and Fulkerson was injured in the accident.

The Cilone estate brought a products-liability action against Ford claiming that the left front wheel assembly separated, due to a defect, over 100 feet prior to the point of impact, causing Cilone to lose control of his Ranger and collide with Fulkerson. Fulkerson intervened in the suit alleging alternate claims for relief. Fulkerson claimed that the accident resulted either because the Ranger lost its wheel or due to Cilone's negligence.

The plaintiffs presented what we must conclude was substantial evidence to establish that the wheel separated from the Ranger prior to the point of impact. Mark Brunner, a passenger in Cilone's vehicle, testified that he heard a loud

noise and Cilone shout prior to Cilone losing control of the vehicle. Furthermore, testimony established that the pavement contained scrape and gouge marks leading to the point of the collision. Investigators found pieces of the vehicle, including rim pieces, a brake caliper arm and wheel chrome over 100 feet prior to the point of impact. The plaintiffs contend that the evidence sufficiently proved that the wheel of the Ranger separated prior to the collision. Further, the plaintiffs contend that Ford's knowledge of the defect led to a design change. The plaintiffs presented product-change request forms prepared in 1984 by Ford. The forms indicate the change was precipitated because of a lack of a secondary retention device necessary to hold the spindle wheel assembly.

Mechanically, the "shrink fit" joint binds the spindle wheel assembly. In 1973, Ford developed the "shrink fit" process for the F-series pick-ups. The spindle body is heated to expand the bore hole. Workers then insert the spindle stem into the bore hole and the assembly is quenched, which results in the spindle body contracting around the spindle stem. On the F-series trucks, the spindle stem contained a "shoulder" or "nailhead" on the end. The shoulder assisted in properly locating the stem within the body during the shrink fit process. Additionally, the "shoulder" acted as a fail safe device to keep the wheel on the vehicle should the shrink fit assembly fail. The Ranger did not contain the "shoulder" on the spindle wheel assembly. Larry Bihlmeyer, a former Ford engineer, testified that the original Ranger design included a "shoulder" which Ford failed to maintain on the device due to monetary consideration. Ultimately, in 1992, Ford included the "shoulder" in the spindle design on the Ranger.

Ford contended that the wheel separated as a result of the force of the impact. There was evidence to support their theory. Ford alleged Cilone lost control of the Ranger due to lack of sleep. It was Ford's position that the marks on the outer and inner races of the left front wheel of the Ranger could not

have been made prior to impact. Additionally, Ford presented evidence that the tie-rod ball joint deformation could have occurred only during impact. Ford also argued that the tire sidewall lacked any abrasion supporting the plaintiff's theory of separation prior to impact. Lastly, Ford claimed that the marks on the pavement did not support the theory of separation prior to impact as the marks were perpendicular to the Ranger's line of travel. Ford theorized that any marks on the road resulted from other vehicles driving through the accident scene and dragging the accident debris, which also accounted for the debris prior to the impact site.

Ford's proof showed that it extensively tested the shrink fit assembly prior to and after production, including two million miles of road durability test, without report of a failure, and a proof test on the joint to insure its ability to withstand a longitudinal force of 17,400 pounds without disengagement. Additionally, Ford claimed it had no evidence that any shrink fit design in the spindle assembly on any Ranger had ever failed under normal use, therefore, Ford had no reason to believe a secondary retention device was necessary.

Ford presented testimony that the shrink fit design change was made for reasons unrelated to safety although, even if the change ultimately improved safety, Ford changed the design without reason to believe it was necessary to prevent injury.

The jury found that the Ranger, driven by Cilone, had a defective shrink fit assembly which was unreasonably dangerous and existed at the time that Ford sold the Ranger. The defective shrink fit assembly was a substantial factor causing the death of Cilone and injuring Fulkerson. Furthermore, the jury found that the evidence established that the accident resulted due to Ford's gross negligence. Thus, the jury awarded compensatory damages of $2,349,025 and punitive damages of four (4) million dollars to the plaintiffs.

Ford's issues on appeal are whether the evidence presented sufficiently supported the failure to direct a verdict, the adequacy of jury instruction in regard to punitive damages, whether the trial court abused its discretion by excluding evidence of a government report, and the application of a 12% interest rate to the judgment.

Ford argues that the trial court erred in denying its motion for a directed verdict. In reviewing decisions on motion for directed verdict, the appellate court must "ascribe to the evidence all reasonable references and deductions which support the claim of the prevailing party." *Meyers v. Chapman Printing Company, Inc.*, Ky., 840 S.W.2d 814 (1992). A trial court may not enter a directed verdict if a disputed issue of fact exists upon which reasonable minds could differ. *Taylor v. Kennedy*, Ky. App., 700 S.W.2d 415 (1985). Ford cites *Coney Island Company v. Brown*, Ky., 162 S.W.2d 785 (1942), stating that the jury may not ignore laws of science, admitted physical facts or undisputed evidence. We agree that a jury may not ignore these factors; however, we disagree with Ford's contention of a complete lack of evidence. The appellees presented evidence from a passenger in the Cilone truck that he heard a loud noise prior to Cilone losing control. Independent expert witnesses, who examined the accident scene and reconstructed the accident, concluded that separation occurred prior to the impact. Further, the appellees presented evidence of scrape and gouge marks on the pavement and pieces of the vehicle found more that 100 feet prior to the point of impact. Clearly, the evidence presented an issue of fact as to when the wheel separated which required jury determination. As such, we conclude the evidence was sufficient to support the jury's findings and award on this issue.

Secondly, Ford contends that the trial court erred in denying Ford's motion for directed verdict on its punitive damages' claim as the appellees presented no evidence of outrageous conduct to support it. Punitive damages are

appropriate when the circumstances of the action indicate a reckless or wanton disregard for the rights of others. *Island Creek Coal Company v. Rodgers*, Ky. App., 644 S.W.2d 339 (1982). A directed verdict must be entered when "there is a complete absence of proof on a material issue in the action." *Washington v. Goodman*, Ky. App., 830 S.W.2d 398, 400 (1992).

When assessing a denial of a motion for directed verdict on appeal, all evidence must be examined to determine whether a question of fact was raised for submission to the jury. *Cassinelli v. Begley*, Ky., 433 S.W.2d 651 (1968).

Ford asserts that the record contains a complete absence of proof necessary to allow for punitive damages. Ford presented evidence of pre- and post- production testing on the shrink fit joint to establish its safety. Ford claimed it had no knowledge that any spindle assembly had failed or that any injury had occurred or was likely to occur. Ford claimed that it made a safety improvement, absent any knowledge of a need for one, to the spindle assembly by adding a shoulder as a retention device.

On the other hand, the appellees presented evidence, through expert testimony and product-change request forms generated by Ford, that a secondary retention feature was necessary for the spindle assembly. Further, the appellees contend Ford knew of the defect present in the shrink fit spindle assembly and failed to take remedial measures for monetary reasons.

Ford produced the spindle assembly on the Ranger using the shrink fit method without a secondary retention feature. Although, Ford claimed it had no knowledge that a retention feature was necessary to prevent separation of the spindle assembly, the appellees presented evidence to the contrary, in that Ford knew of other incidents in which the shrink fit assembly failed and recognized the need to alter the

design to add a secondary retention feature in product-change request forms. Certainly, the conflicting evidence presented a question of fact as to whether Ford had acted with reckless disregard for the rights of others in failing to add a secondary retention device on the spindle assembly. Thus, the trial court appropriately denied Ford's motion for directed verdict on its punitive damages' claim.

Additionally, it is Ford's position that the jury instruction regarding punitive damages was improper. Ford argued that the jury instruction for punitive damages must include the nature and purpose of punitive damages, along with factors to be considered when awarding punitive damages. Also, the trial court erred in failing to define willful and malicious conduct and failed to require a clear and convincing evidence standard for punitive damages. In support of these contentions, Ford cites several law journal articles and cases from foreign jurisdictions. These authorities are not persuasive to us.

As stated by the Supreme Court in *Ford Motor Company v. Fulkerson, supra, (Fulkerson I)*, unlike many jurisdictions which rely on pattern instructions and explain the law of the case to the jury, Kentucky requires the trial court to frame the dispositive issue. *Id.* at 122. The *Fulkerson I* Court held:

> Our approach to instructions is that they should provide only the bare bones, which can be fleshed out by counsel in their closing arguments, if they so desire. *Cox v. Cooper*, 510 S.W.2d 530, 535 (1974).

Additionally, Kentucky requires that punitive damages' instructions define their purpose as punishment. *Hanson v. American National Bank & Trust Company*, Ky., 844 S.W.2d 408 (1992) (*Hanson I*). Punitive damages also require the decision to be based on the evidence and free from passion or

prejudice. *Hanson v. American Bank & Trust Company*, Ky., 856 S.W.2d 302, 310 (1993) (*Hanson II*).

Under the facts at hand, the trial court instructions met the "bare bones" requirements of our case law. Instruction seven informed the jury that it was within their discretion to award punitive damages, if satisfied from the evidence that the accident was caused by gross negligence on the part of Ford. Further, the instructions defined gross negligence. In closing argument, counsel for Ford took the opportunity to expand on the instructions and "flesh them out" for the jury. During the argument, counsel informed the jury that punitive damages are assessed "as a form of punishment where there has been outrageous conduct." Additionally, counsel pointed out that such damages must be determined fairly from the evidence and not result from passion, prejudice or sympathy.

Clearly, the punitive damage instruction submitted to the jury, supplemented by counsel's closing arguments, met the "bare bones" requirements of Kentucky. The trial court framed the issue to be decided by the jury: whether Ford's actions constituted gross negligence, which would support an award of punitive damages. We hold the punitive damages' instruction met the general principles of Kentucky case law; therefore, the instructions were not erroneous.

It is significant to note that the adoption of KRS 411.184 and KRS 411.186 requires instructions as to the factors which the jury must consider when awarding punitives and proof that outrageous conduct occurred by clear and convincing evidence. However, Ford and appellees stipulated that the controlling authority for the facts under consideration would be fixed at the time of the accident in 1987. The enactment of KRS 411.184 and KRS 411.186 occurred in 1988. Thus, the statute is not applicable to the present action.

Further, Ford asserts that the trial court erred by failing to order separate trials on the issues of causation and punitive

damages. CR 42.02 states that a trial judge may order separate trials on any claim if it will avoid prejudice or will be conducive to expedition and economy. The rule is a discretionary one as it uses the word "may." As such, ordering separate trials is within the sound discretion of the trial court judge. We conclude there was no abuse of discretion.

Also, Ford contends that the trial court erred in excluding evidence of a document entitled "preliminary evaluation resume" regarding wheel spindle failure. It is assumed that the trial court judge excluded the document presented as it was a preliminary report based on information received from Ford. The analysis by the agency is cursory at best. The report mentions no testing procedures or inquiries; it simply states a belief that, if separation occurred, it should be considered an isolated incident.

Under Kentucky Rules of Evidence 803(8), a document is not excluded by the rules against hearsay unless the sources of information or circumstances indicate a lack of trustworthiness. Reports of public offices or agencies, setting forth factual findings resulting from an investigation made pursuant to authority granted by law, are admissible. However, the document presented by Ford is not a report envisioned by the legislature when adopting KRE 803(8). The report does not qualify under the rule. The trial judge did not abuse his discretion by excluding the evidence.

Lastly, Ford claims the trial court abused its discretion by applying a 12% interest rate to the judgment. KRS 360.040 permits a trial court to award a judgment interest rate of up to 12% when appropriate. We find no abuse of discretion, as the trial court judge was within his statutory authority in assessing an interest rate of 12% to the judgment.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

NO. 85CI06869 JEFFERSON CIRCUIT COURT
DIVISION 12

MELINDA HERRENSMITH, ET AL PLAINTIFF

V. *AMENDED AND SUBSTITUTED ORDER*

FORD MOTOR COMPANY DEFENDANT

This case is before the Court on certain post judgment motions filed by the defendant, Ford Motor Company, for a new trial, for a judgment notwithstanding the verdict, for independent review of the punitive damage award and for reduction of the statutory interest rate on the final judgment.

The Court having considered said motions and arguments of counsel which appear on Video Record 30-12-93-VCR-032, as continued on 30-12-93-VCR-038, as well as in the briefs filed by all of the parties and being advised;

It is ORDERED:

1. The defendant's motion for a new trial and for judgment notwithstanding the verdict be and the same are hereby DENIED.

2. If the jury believed the testimony of a former employee of the Ford Motor Company, that the management of the company notwithstanding knowledge of the danger in using a shrink fit spindle, it intentionally elected not to correct the defect because of the expense of redesign and permitted this vehicle to be manufactured and delivered to the public, including the plaintiff, then there would be sufficient facts to support the award of punitive damage. Such an award would serve as a deterrent to prospective wrong-doers, and act as

punishment for this conduct. This Court's punitive damages instructions followed exactly instructions given in almost identical cases which were sustained by the Supreme Court. Even if we apply the standards in *Pacific Mutual Life Insurance Company v. Haslip*, 11 S.Ct. 1032 (1991) the facts support the punitive damages award thus the defendant's motion on this account is DENIED.

3. For the reason that no sufficient reason has been given for this Court to depart from the statutory rate of 12%, the motion on this account is also DENIED.

This is a final order.

/S/ Edwin A. Schroering, Jr.
EDWIN A. SCHROERING, JR., JUDGE
DATE: MAY 13, 1993

cc: William Grubbs
William Miller, Jr.
A. Campbell Ewen
Kenneth Sales

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 93-CA-1365-MR

FORD MOTOR COMPANY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE EDWIN A. SCHROERING, JR., JUDGE
ACTION NO. 85-CI-6869

MELINDA HERRENSMITH
(Individually, as
Mother of Troy E. Cilone,
Infant, and as Administratrix
of the Troy E. Cilone Estate);
WILLIAM FRANKLIN FULKERSON;
PAULINE FULKERSON; and
ALLSTATE INSURANCE COMPANY — APPELLEES

ORDER DENYING PETITION FOR REHEARING

BEFORE: EMBERTON, HUDDLESTON and McDONALD, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: MAY 19, 1995 /S/ Thomas E. Emberton
JUDGE, COURT OF APPEALS

SUPREME COURT OF KENTUCKY
95-SC-510-D
(93-CA-1365)

FORD MOTOR COMPANY — MOVANT

V. JEFFERSON CIRCUIT COURT
NO. 85-CI-6869

WILLIAM FULKERSON, ET AL. — RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for discretionary review of the decision of the Court of Appeals is denied. The movant's motion for leave to cite additional authority is granted. The movant's motion to strike a portion of the response is granted.

ENTERED January 10, 1996.

/S/ Robert F. Stephens
Chief Justice

NO. 85-CI-06869 JEFFERSON CIRCUIT COURT
DIVISION 12

MELINDA HERRENSMITH, Individually and as Mother of Troy E. Cilone, Infant, and as Administratrix of the Estate of Troy E. Cilone, Deceased — PLAINTIFF

WILLIAM FRANKLIN FULKERSON
PAULINE FULKERSON — INTERVENING PLAINTIFFS

vs. **MEMORANDUM IN SUPPORT OF FORD MOTOR COMPANY'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SEPARATE TRIAL OF PLAINTIFFS' CLAIMS FOR PUNITIVE DAMAGES**

FORD MOTOR COMPANY — DEFENDANT

MELINDA HERRENSMITH, etc. — INTERVENING DEFENDANT

Comes the Defendant, Ford Motor Company ("Ford"), by counsel, and submits this Memorandum in Support of its Motion to Dismiss or, in the Alternative, for Separate Trial of Plaintiffs' Claims for Punitive Damages.

* * *

SUMMARY OF ARGUMENTS

The Kentucky General Assembly has promulgated legislation that specifies a plaintiff's burden of proving a

punitive damages claim and provides guidance to juries in assessing punitive damages. *See* KRS 411.184 and 411.186. Although those statutes did not become effective until July 15, 1988, one might argue that KRS 411.184 and 411.186 should apply retroactively to causes of action that accrued prior to that effective date because Plaintiffs are not entitled to punitive damages as a matter of right and the statutes are remedial or procedural. However, existing Kentucky case law holds to the contrary. *See Koching v. Internat'l Armament Corp.*, Ky., 772 S.W.2d 634 (1989) and *Ingersoll-Rand Co. v. Rice*, Ky. App., 775 S.W.2d 924 (1988). Thus, under authority binding on this Court, KRS 411.184 and 411.186 are inapplicable to this case. However, Ford reserves the right to contend, if necessary, that *Koching* and *Ingersoll-Rand, supra*, are erroneous and should be overruled.

Consequently, common law standards must apply to Plaintiffs' punitive damages claims against Ford. As explained below, Plaintiffs' claims for punitive damages should be dismissed because, under existing Kentucky common law and the standards recently set forth in *Pacific Mut. Life Ins. Co. v. Haslip*, 113 L.Ed.2d 1 (1991), a punitive damages award would violate due process requirements under the United States Constitution and the Kentucky Constitution.

I. *Punitive Damages Awards, Granted Under Existing Kentucky Common Law Standards, Would Violate Due Process.*

* * *

The award of punitive damages involves a loss of property and therefore invokes the protection of the Due Process Clause. In *Pacific Mut. Life Ins. Co. v. Haslip*, 113 L.Ed.2d 1, 20 (1991), the Supreme Court recognized that due process considerations apply to punitive damages awards. The *Haslip* Court, in determining the constitutionality of an Alabama punitive damages award, held that due process

requires courts to implement two procedural safeguards to ensure that punitive damages awards are not so astronomical as to "jar one's constitutional sensibilities." *Haslip*, 113 L.Ed.2d at 20. First, the trial court must issue jury instructions that provide definite guidelines concerning whether an award of punitive damages would be proper under the circumstances and, if so, also advise the jury regarding the appropriate amount of such an award. *Id.* at 20-21. Second, there must be a system of appellate review to "provide an additional check on the jury's or trial court's discretion" in awarding punitive damages. *Id.* at 21-22. Without those safeguards, a punitive damages award violates due process precepts. *Id.*

A comparison of the Kentucky common law punitive damages standards with those of Alabama reveals that the Kentucky system fails to meet the *Haslip* requirements. The *Haslip* Court held that the Alabama trial court's instructions passed constitutional muster because they placed reasonable constraints on the exercise of the jury's discretion by expressly describing the retributive and deterrent purposes of punitive damages, by explaining that the imposition of punitive damages was not compulsory, and by setting an objective standard for limiting the amount of the award. *Id.* at 12 n.1, 15 and 20-21.

* * *

Similarly, Kentucky case law provides no standard with respect to the amount of punitive damages that the trier of fact may award. Again, the award need not be related to the actual injury. The only restriction upon the amount awarded is that it not be "excessive." *Engleman v. Caldwell & Jones*, 243 Ky. 23, 47 S.W.2d 971 (1932). In examining an award of punitive damages for "excessiveness," the trial court must simply determine whether the award appears to have been given under the influence of passion or prejudice. *Fowler v. Mantooth*, *supra*, at 253. Undeniably, then, the current Kentucky common law punitive damages standards, lacking the criteria provided

by KRS 411.184 and 411.186, fail to satisfy the *Haslip* due process requirement for jury instructions.

Moreover, the Kentucky system also fails to clear the second *Haslip* due process hurdle, that of providing adequate post-trial procedures to ensure that the trier of fact has not abused its discretion in deciding punitive damages issues. * * *

* * *

Kentucky's standards for review of an award of punitive damages mirror those schemes specifically questioned in *Haslip*. Under Kentucky common law, an award of punitive damages is "excessive" only when it indicates passion, prejudice or bias. *Kentucky Border Coal Company, Inc. v. Mullins*, Ky., 504 S.W.2d 696, 698 (1974); *Bisset v. Goss*, Ky., 481 S.W.2d 71, 74 (1972). Thus, Kentucky's system is the equivalent of that established by Mississippi, which the Supreme Court expressly distinguished in the *Haslip* decision.

Due to qualitative and quantitative deficiencies in the common law standards relating to an award of punitive damages in Kentucky, a number of procedural shortcomings result. These include:

> (1) a lack of sufficient clarity for determining when punitive damages are appropriate;
>
> (2) a lack of sufficient clarity for determining the appropriate size of a punitive damages award;
>
> (3) the failure to prohibit such awards on the basis of invidiously discriminatory characteristics; and
>
> (4) a lack of meaningful judicial review.

These procedural deficiencies render any award of punitive damages under Kentucky law violative of the due process required under the United States and Kentucky Constitutions.

II. *The Lack of Appropriate Standards For an Award of Punitive Damages Also Violates the Due Process Clause Under a "Void for Vagueness" Analysis*

An additional requirement under the Due Process Clause is that laws must be defined "in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (criminal statute); *see also Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (civil penalties, "quasi criminal" ordinance); and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (civil action based on Minnesota Human Rights Act). A law which fails to meet that requirement is constitutionally invalid under the "void for vagueness" doctrine. The doctrine's primary goal is to ensure that finders of fact and law enforcement personnel do not "pursue their personal predilections." *Kolender*, 461 U.S. at 358. It also aims to reduce "the danger of caprice and discrimination in the administration of the laws" and to "permit[] meaningful judicial review." *Roberts*, 468 U.S. at 629.

* * *

Because Kentucky common law does not provide any cognizable limits or guidelines with respect to when punitive damages may be awarded or in what amount, the law regarding punitive damages is void for vagueness and constitutionally invalid. In view of the complete absence of guidance as to when and in what amount punitive damages will be inflicted for any type of conduct, it is beyond dispute that the laws are "so vague that [persons] of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Roberts*, 468 U.S. at 629. Similarly, the vagueness of the laws precludes the predictability that due process requires so that potential defendants can structure their conduct with a reasonable understanding of the consequences. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985), citing

Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

Therefore, due to the lack of procedural safeguards and notice, Kentucky's common law regarding punitive damages is void for vagueness and violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Section 2 of the Constitution of Kentucky.

* * *

CONCLUSION

The Court should dismiss Plaintiffs' claims for punitive damages because the applicable standards under Kentucky law for an award of such damages violate due process requirements of both the United States Constitution and the Constitution of Kentucky. In the alternative, the Court should try the punitive damages issues separately, and only if Ford is first found liable for Plaintiffs' alleged actual damages.

* * *

EXCERPTS FROM UNOFFICIAL TRIAL TRANSCRIPT

January 5, 1993

THE COURT: * * * Now, is there anything further that we need to do before we proceed?

MR. GRUBBS: Yes, Your Honor. We had a motion that we filed to bifurcate the trial as to punitive damages if the Court were to allow that to be retried or to dismiss the punitive damages completely on the constitutional grounds that we set forth in the brief supporting our motion. * * *

* * *

Do I understand, then, that you are overruling both the motion to dismiss the punitive damage counts on the basis —

THE COURT: (Interrupting) Yes, and also—

MR. GRUBBS: (Continuing)—of the constitutional problems and also the motion to bifurcate?

THE COURT: That's correct. I'm just gonna go ahead and retry the case from scratch trying to follow as best I can the mandate of the Supreme Court.

MR. GRUBBS: Certainly. Thank you, Your Honor. I just wanted to make that clear for the record.

THE COURT: It is clear.

January 14, 1993

MR. GRUBBS: Yes, Your Honor. The Defendant Ford Motor Company would respectfully move the Court for a directed verdict at the conclusion of plaintiff's proof. And I would like to address those on both the claims of the plaintiff and the intervening plaintiffs, and I would like to address the motion separately to specific claims and allegations in this case.
* * *

* * *

Your Honor, I would move separately or serially for a directed verdict on the—the claim for punitive damages.

* * *

* * *

Secondly, with regard to the punitive damage claim, I would point out to Your Honor that for punitive damages, I believe that the common law of Kentucky, while it may be unclear, as influenced by our constitutional rights, require a higher standard of proof than a mere preponderance of the evidence for plaintiffs to recover punitive damages. * * *

* * *

Finally, Your Honor, with regard to the motion for—or with regard to the claim for punitive damages, we have previously filed a motion to dismiss those on constitutional grounds that we have articulated in a brief that Your Honor has considered, and I don't want to reargue those points, but I do want to incorporate those in my motion for a directed verdict by reference, the grounds articulated in our brief that we filed before the trial to dismiss those. Those grounds also ought to be considered by the Court in connection with our motion for a directed verdict.

THE COURT: Very well.

MR. GRUBBS: For those reasons, Your Honor, I move to have those claims dismissed.

* * *

THE COURT: I'm gonna overrule the motions at this time.

January 21, 1993

THE COURT: All right. Let the record show that the jury has now left the courtroom. Now, at the termination of all the evidence, are there any motions at this time?

MR. GRUBBS: Yes, Your Honor. The defendant Ford Motor Company respectfully moves the Court to enter a directed verdict in its favor in this case * * * . I have previously in my motion for directed verdict at the conclusion of the plaintiff's case stated in detail a number of arguments which I would ask the Court's permission to incorporate by reference at this time. And I think the constitutional arguments as to punitive damages as well should be included in—in our motion for a directed ver—verdict, Your Honor. * * *

* * *

THE COURT: Anything further —

MR. GRUBBS: (Interrupting) Yes, Your Honor.

THE COURT: (Continuing)—on this question?

MR. GRUBBS: I would just respond with regard to Mr. Sales' argument. * * * Mr. Bihlmeyer simply offers an opinion that the reason the head was not put on in the Ranger was to save money and cost, and Your Honor's heard that evidence.

* * *

Now, what you really have is simply an opinion that is con—contradicted by factual testimony from firsthand witnesses that is in no way ever disputed. And the—his analysis of his cost and weight saving, Your Honor, you heard it and—and it is so preposterous. He didn't even know how the spindle forging was received and he starts out his analysis with a—just a piece of bar stock and you grind it down and it's just wrong, it's just completely wrong, it's not even close. It—it's—to an engineer, it's ludicrous, it's tragic. But it certainly is not the type of proof, it doesn't rise to the level of proof, the dignity of persuasive evidence, and I believe that that evidence has got to

be not just a mere preponderance and not just an inference to warrant submitting it to the jury, but it's got to be clear and convincing proof.

THE COURT: Well, I—I certainly think we all agree that if we were going by the current law, that—that clear and convincing is the test on punitive damages.

MR. GRUBBS: I think it is a constitutional requirement, Your Honor. I think it—I think it is what the common law—if it is not expressed in—in earlier decisions, it is what the common law should be.

THE COURT: All right.

MR. GRUBBS: And it is certainly what the common law has been in numerous other jurisdictions. I think it is a constitutional requirement that before you can impose civil punishment on someone, that the evidence has got to at least be of a heightened standard, more than a mere preponderance of the evidence, and it—and I think that this—this evidence just doesn't come close. * * *

* * *

THE COURT: I know that this is a marginal call. * * * On the question of punitive damages with the—this additional testimony that incidentally the last time this case was tried, they—it wasn't in, we didn't have it. With that additional testimony, I think there's enough for at least under the old law to submit. So I'm going to overrule the motion for—for peremptory on both counts.

* * *

THE COURT: Now, what about instructions? I give—I gave you-all a set of—I think of instructions that contained a number of things and I've already indicated on the record my concern in one area. Ford wants to apportion—.

MR. GRUBBS: Your Honor —

THE COURT: (Interrupting) Wants to apportion fault in the case; is that right?

MR. GRUBBS: Yes, Your Honor. Your Honor, may I tender—at the conclusion of the evidence in—in light of your ruling on punitive damages —

THE COURT: (Interrupting) Sure.

MR. GRUBBS: (Continuing)—I would tender for the record an additional instruction on punitive damages —

THE COURT: (Interrupting) You certainly may.

MR. GRUBBS: (Continuing)—in order to again continue to preserve our point with regard to the constitutional issues that are involved and, of course, part of our argument as to the constitutionality is that the traditional instructions that have been given in Kentucky on punitive damages do not meet the constitutional requirements as set forth by the United States Supreme Court. But I have also —

THE COURT: (Interrupting) You know, we had—I gave an instruction, a similar one proposed, in a products liability case that went both to the Supreme Court of Kentucky and also it went up on—on discretionary review or certiorari to the Supreme Court of the United States and it was affirmed and this was under the old law. So I—I don't know that there's anything in addition considering the bare bones mandate that the Supreme Court has given the circuit judges on instructions, I don't know whether I can properly give an instruction of this length. But I'm gonna show your proposed in—instructions tendered and filed.

* * *

MR. GRUBBS: Your Honor —

THE COURT: (Interrupting) Yes.

MR. GRUBBS: (Continuing)—one last thing. If we could go back to the instruction on punitive damages.

THE COURT: Sure.

MR. GRUBBS: And for the record, I would just like to make some additional objections.

THE COURT: Sure, you may.

MR. GRUBBS: The punitive damage instruction as Your Honor has prepared it has no reference at all to deterrence. It does not discuss or define the term wanton or reckless disregard, it does not include will—define willful or malicious acts, and again the—the instruction—we—we have the other objections to the—this type of an instruction, and I guess I would say, Your Honor, in conclusion that we would object to the instructions to be given by the court for failure to give the instructions that we have tendered in this case so as to preserve all of those points for appeal, not only that we've tendered instructions, but we object to the failure to give those instructions.

THE COURT: Sure. Very well. * * *

January 22, 1993

THE COURT: All right. You may be seated. All right. Now, ladies and gentlemen of the jury, we have now reached the stage of the -- of this case when the Court will give you the law of the case, the instructions as it applies to the evidence presented. Immediately after the instructions, you will be given closing arguments. Now, in order to facilitate the jury's consideration of this case, what we're going to do today is to continue our deliberations right through the luncheon hour, that doesn't mean you're not gonna have lunch. Those jurors that remain will be served their lunch here, and we're gonna let you deliberate in the courtroom since we have all the exhibits and

everything in here. You'll have the use of the entire courtroom for the purposes of your deliberations.

Of course, the courtroom will be secured in every way so that you can conduct your deliberations in -- in -- confidentially. So we will now proceed, then, with these instructions.

The court -- the jury is instructed as follows. It's the claim -- instruction number one: It's the claim of all the plaintiffs, Melinda Herrensmith, individually and as mother -- and as administratrix of the estate of Troy E. Cilone, and William Franklin Fulkerson and Pauline Fulkerson that the 1984 Ford Ranger operated by the deceased, Troy E. Cilone, was defective in that the left wheel separated prior to the collision, while the Ford Motor Company claims the wheel separated at impact. You will find for all of the plaintiffs and against the defendant Ford Motor Company under this instruction if you are satisfied from the evidence as follows: A, that the 1984 Ford Ranger operated by Troy Cilone was in a defective condition unreasonably dangerous; B, that such defective condition existed at the time that the 1984 Ford Ranger was sold by the defendant Ford Motor Company; and C, that such defective condition was a substantial factor in causing injury to William Franklin Fulkerson and the death of Troy Cilone; otherwise you will find for the defendant Ford Motor Company and award the plaintiffs nothing.

Now, you are instructed that the defendant Ford Motor Company is presumed to know the qualities and characteristics and actual condition of its products at the time that they were sold. As used in this instruction, the 1984 Ford Ranger was in a, quote, defective condition unreasonably dangerous, end quote, if it lacked any element necessary to make it safe for use or contained any condition that made it unsafe for use such that it created a risk of injury to a prospective user to the extent that an ordinarily prudent company engaged in the manufacture of

similar products being fully aware of the risk would not have put it on the market.

Now, you may use verdict form A in returning your verdicts if you find in favor of the defendant Ford Motor Company under this instruction; otherwise proceed to the remaining instructions.

Instruction number two: It was the duty of Troy Cilone at the time and place in question to exercise ordinary care in the operation of his vehicle and that duty included the obligation; A, to use ordinary care to drive his vehicle on the right side of the highway; B, to keep his vehicle under reasonable control.

Now, ordinary care as used in this instruction means such care as an ordinarily prudent person would exercise under similar circumstances. If you believe from the evidence that Troy Cilone failed to comply with this duty and that such failure was a substantial factor in causing his injuries, then you shall find Cilone at fault.

You should answer the following interrogatory here and on verdict form B at the end of these instructions. Do you believe that Cilone failed to perform any of his duties as set out in instruction number two, yes or no. If you answer yes, proceed to the next instruction. If you answer no, proceed directly to instruction number four.

Instruction number three: If you've answered yes to the interrogatory under instruction number two, then in this instruction you shall determine the percentage of total fault that is to be allocated between the plaintiff Troy Cilone and the Ford Motor Company. In determining the percentage of fault, you should consider both the nature and the conduct of each party at fault and the extent of causal connection between the conduct and the damages claimed.

Then it has a place there, Troy Cilone, blank percent, Ford Motor Company, blank percent, total 100 percent. Use verdict form C to indicate your allocation of fault, then proceed to instruction number four.

Instruction number four: If you find for the plaintiffs against the Ford Motor Company under instruction number one, you will award Melinda Herrensmith such a sum or sums in money as will fairly and reasonably compensate her and the estate of Troy Cilone for the following damages, if any, which you may believe resulted from the accident. You should not consider contributory -- contributing fault, if any, in determining damages. A, funeral expenses not to exceed $8,951.50; B, damage to the estate resulting from a destruction of Troy Cilone's power to labor and earn money not to exceed $2 million, the amount claimed; C, fair and reasonable compensation to Melinda Herrensmith for her loss of affection and companionship of Troy Cilone from June 2nd, 1985, until February the 20th, 1986, when he would have reached 18 years of age, not to exceed $500,000.00, the amount claimed. You may use verdict form D in returning your verdict through this instruction.

Instruction number five: If you find for the plaintiffs against the Ford Motor Company under instruction number one, you will award plaintiff William Franklin Fulkerson such a sum or sums of money as will fairly and reasonably compensate him for the following damages which you may believe from the evidence he has sustained by reason of the accident. You should not consider contributory fault, if any, in determining damages. A, mental and physical pain and suffering, including that which he is reasonably probable to endure in the future, not to exceed $1,000,000.00, the amount claimed; B, lost wages and permanent impairment of his power to labor and earn money not to exceed the sum of $180,000.06 -- no, $180,006.00, the amount claimed; C, reasonable expenses incurred for hospital and medical services, medicine and

medical supplies not to exceed $74,274.71; D, future and reasonable probable medical expenses not to exceed 70,000, the amount claimed; E, your total award under this instruction shall not exceed the sum of $1,324,280.00, the amount claimed. You may use verdict form E in returning your verdict under this instruction.

Instruction number six: Pauline Fulkerson claims that she has suffered a loss of consortium and seeks damages on this account. Loss of consortium is define -- is defined as a loss of society, companionship, conjugal affection, fellowship and assistance of a spouse. If you have found for the plaintiffs against Ford Motor Company under instruction number one and you also find from the evidence that Pauline Fulkerson has suffered a loss of consortium as a direct result of the accident, then you shall award her such a sum in damages as you may believe from the evidence will fairly and reasonably compensate her for such loss, not to exceed the sum of $500,000.00, the amount claimed by her. You may use verdict form F in returning your verdict under this instruction.

Instruction number seven: If you find for the plaintiffs Fulkerson and Herrensmith against the Ford Motor Company under instruction number three and if you are further satisfied from the evidence that the accident was caused by the gross negligence on the part of the Ford Motor Company, you may, in your discretion, award punitive damages against the Ford Motor Company in addition to the damages otherwise authorized under these instructions in an amount at the discretion of the jury. If you award punitive damages, you will state the amount separately from the sum or sums awarded under any other instruction, and you may use verdict form G for this purpose.

Gross negligence means wanton or reckless disregard for the lives and safety of other persons, including the plaintiffs, or a willful and malicious act.

Instruction number eight: Nine or more of you may reach a verdict in this case. If all agree on the verdict, only your foreperson whom you yourselves shall choose need sign the verdict. If less than 12 of you agree to the verdict, then all of those who agree to it may sign it -- or must sign it. Excuse me.

Now, attached to these instructions are verdict forms and I'll -- I'll say it this time, instead -- I know all of you are going to receive copies of these instructions to take back with you in the jury room, so don't worry about that. You'll have -- each of you will have your own copy, but only the foreperson whom you yourself choose will have the verdict forms and they are attached only to the instruction which I've marked original at the top here (indicating). The foreperson usually uses this.

And the reason I don't send these verdict form backs -- back with all of the other copies is if you have 12 sets of verdict forms back there, sometimes it gets confusing. So if you only have one set, you only have one to worry about and you work that, as I say, through the foreperson.

Now, verdict form A reads: We, the jury, find for the defendant Ford Motor Company under instruction number one and award the plaintiffs nothing. If that's your verdict, you sign here and that ends the case. Either the -- unanimous if it's the foreperson -- if it's unanimous, the foreperson signs or if -- it takes at least nine.

Verdict form B: Now, if you find for the plaintiffs after considering the evidence, the jury answers the interrogatory under verdict form B as follows: Do you believe from the evidence that Troy Cilone failed to perform any of his duties required of him under instruction number two and that such failure was a substantial factor in causing the accident. If you answer yes, then you proceed under the instructions directly to the next instruction. If you answer no, then you skip and go to the next instruction, but the instructions will tell you that. If it's

unanimous, only the foreperson signs; if it's not, then at least nine.

Verdict form C: We believe that both Cilone and Fo -- and Ford were at fault, allocate total percentage of fault between and -- we believe that both Cilone and Ford were at fault and allocate total percentage of fault between them as follows: Cilone, blank percent, Ford, blank percent, and it's got to add up to 100 percent. If you apportion fault under these instructions, you gotta put percentage figures in there, and a place for the foreperson to sign, it takes at least nine.

And then verdict form D: We, the jury, find for the plaintiffs against the defendant Ford Motor Company under instruction number four and award damages as follows, and this is for Melinda Herrensmith: For Melinda Herrensmith, individually, as mother and administratrix of the estate of Troy E. Cilone; A, funeral expenses not to exceed $8,951.50. If you award damages, you gotta put the amount, whatever you find here; B, damage to the estate resulting from destruction of Troy Cilone's power to labor and earn money not to exceed $2 million, you've got to put whatever you find over here; C, fair and reasonable compensation to Melinda Herrensmith for the loss of her affection and companionship from Troy Cilone from date of death until he would have been 18 years of age not to exceed $500,000.00, you put it there. And a place unanimous sign there, if not, it -- at least nine.

Verdict form E: We, the jury, find for the plaintiffs against Ford Motor Company, instruction number five, and award damages as follows, and for William Franklin Fulkerson: Mental and physical pain and suffering, including that which he is reasonably certain to endure in the future, not to exceed $1 million, put -- put the amount there, whatever you award; for lost wages and impairment to his power to labor and earn money, not to exceed $180,006.00 and you put that here; and C, reasonable expenses incurred for hospital and medical

services, medicines and medical supplies not to exceed 74,274 and you put that amount there; finally future and reasonable probable medical expenses not to exceed $70,000.00, the amount there. Then you add that up for a total award not to exceed 1,324,280. If it's unanimous, only the foreperson signs; if it's not, then at least nine of your number.

And then verdict form F: We, the jury, find for the plaintiff Pauline Fulkerson against the defendant Ford Motor Company under instruction number six and award damages as follows for Pauline Fulkerson: A, for the loss of consortium, society, companionship, conjugal affection, fellowship and assistance of William Franklin Fulkerson, her husband, not to exceed $500,000.00 and you put whatever that is here and a place for the foreperson to sign if unanimous; if not, it takes at least nine.

Finally, verdict form G: We, the jury, having found -- jury having found for the plaintiffs under instruction number two against Ford Motor Company and being satisfied from the evidence that the accident was caused by the gross negligence on the part of the Ford Motor Company award punitive damages against plaintiffs -- against Ford Motor Company as follows: For Melinda Herrensmith, administratrix of the estate of Troy E. Cilone, not to exceed $2 million, William Franklin Fulkerson, not to exceed $2 million.

Now, I'm gonna change this verdict form G, that should be -- instead of verdict form two in -- in here, it should be -- .

MR. GRUBBS: Instead of instruction number two, it should be instruction number -- .

THE COURT: It should be number -- .

MR. GRUBBS: Seven.

THE COURT: Number one, I guess.

MR. GRUBBS: Number seven.

THE COURT: Excuse me.

MR. SALES: Yes, it should be seven, Your Honor.

MR. MILLER: Seven.

MR. SALES: Seven.

THE COURT: Yes. Anything else? Any other corrections that you -- ?

MR. SALES: No, Your Honor.

THE COURT: Very well. Now, we'll proceed with the -- with the closing arguments.

Tendered in
Open Ct.
1/21/93

NO. 85-CI-06869 JEFFERSON CIRCUIT COURT
DIVISION 12

MELINDA HERRENSMITH, Individually and as Mother of Troy E. Cilone, Infant, and as Administratrix of the Estate of Troy E. Cilone, Deceased — PLAINTIFF

WILLIAM FRANKLIN FULKERSON
PAULINE FULKERSON — INTERVENING PLAINTIFFS

vs.

FORD MOTOR COMPANY'S PROPOSED INSTRUCTIONS ON THE ISSUE OF PUNITIVE DAMAGES

FORD MOTOR COMPANY DEFENDANT

MELINDA HERRENSMITH, etc. — INTERVENING DEFENDANT

Ford Motor Company ("Ford"), Defendant, proposes that the Court instruct the jury on the issue of punitive damages as follows:

THE COURT INSTRUCTS THE JURY AS FOLLOWS:

1. If you have answered Verdict Forms A and B "YES," and have awarded to Melinda Herrensmith and the Fulkersons a sum or sums in damages under Instructions Nos. _____, and if you are further satisfied by clear and

convincing evidence that Ford designed and/or manufactured the left front spindle assembly of the 1984 Ford Ranger in issue in this case with malice or a reckless or wanton disregard for the rights of others, you may award punitive damages against Ford in addition to the compensatory damages already awarded. As used in this instruction, "clear and convincing evidence" means a degree of proof that will produce in your mind a firm belief and conviction that the allegations sought to be established are highly probable. It is a degree of proof stricter than a mere preponderance of evidence, and applies only to the issue of punitive damages in this case. A finding of "malice" in this case means that to award punitive damages, you must believe that Ford specifically intended to hurt Troy Cilone and William Franklin Fulkerson, or acted with a flagrant indifference to their rights and a subjective awareness that its conduct would result in human death or bodily harm. Alternatively, you may find that Ford acted with a "reckless and wanton disregard for the rights of others" only if it considered such rights so unworthy of its attention or concern as to be cruel, inhumane or merciless.

As should be clear from these instructions, the conduct necessary to support an award of punitive damages must be such as would outrage the community. Punitive damages must not be awarded if you believe that the accident made the basis of this case was the result of a mistake by Ford or negligence. You must not base your decision on whether to award punitive damages on any hostility you may feel toward corporations generally or toward Ford in particular, or on any sympathy you may have for Troy Cilone, Melinda Herrensmith or the Fulkersons. You must not decide whether to award punitive damages based on where a defendant resides, whether a defendant is a corporation, whether a defendant is wealthy, whether a defendant is large or small, or other such factors.

In considering whether an award of punitive damages would be proper in this case, it is appropriate to consider that the strength of the spindle assembly in issue was tested before its sale, and that an agency of the federal government had investigated the design and manufacture of such spindles and concluded they were safe.

With these instructions in mind, and using Verdict Form H, you will answer "YES" or "NO" the question of whether you are satisfied by clear and convincing evidence that Ford designed and/or manufactured the left front spindle assembly of the 1984 Ford Ranger in issue in this case with malice or a reckless or wanton disregard for the rights of others. If your answer is "YES," you will proceed to the next instruction. If your answer is "NO," then proceed directly to Instruction No. ___.

2. In determining the amount of punitive damages to award, you must remember that the purpose of punitive damages is not to award the plaintiff a windfall, but to punish a person for outrageous conduct and to deter such person and others from similar conduct in the future. You must not award punitive damages for any other purpose. You must award only the amount that you find by clear and convincing evidence is necessary to impose appropriate punishment and deterrence for the wrongful conduct that you find to have occurred in this case.

If you award punitive damages, you should consider a number of factors in determining the proper amount. First, you should consider the likelihood at the time of Ford's conduct that serious harm would arise from it, and the degree of, Ford's awareness of that likelihood. Again, it is appropriate that you consider not only the extent to which Ford tested the design of its spindle assemblies for 1984 Ford Rangers, but the testing that was performed on the very spindle assembly in issue here to determine whether it had been properly manufactured.

Second, you should consider whether Ford profited from its conduct. Third, you should consider the duration of the conduct and Ford's efforts to remedy the defect once it was aware of the problem. In this regard, it is appropriate that you consider the fact that Ford changed the design of the spindle assembly and the evidence bearing on the issue of why those changes were made.

Finally, if you decide to award punitive damages against Ford, your award to each Plaintiff must bear some reasonable relationship to the compensatory damages each has recovered. While the amount of punitive damages you award is within your discretion, such awards typically do not exceed three times the amount of compensatory damages recovered by a plaintiff.

In determining the amount needed for proper deterrence, you must consider and take into account that monetary awards paid by a defendant for compensatory damages will have a deterrent effect without the necessity to award punitive damages. In addition, a defendant's wealth or financial condition should play no part in a jury's determination of the amount of punitive damages that should be awarded against it.

With these instructions in mind, and using Verdict Form I, you will award against Ford that sum of money, if any, you find by clear and convincing evidence should be awarded as punitive damages.

_____

Edwin A. Schroering, Jr., Judge

Date:_____

NO. 85-CI-06869 JEFFERSON CIRCUIT COURT
DIVISION 12

MELINDA HERRENSMITH, Individually and as Mother of Troy E. Cilone, Infant, and as Administratrix of the Estate of Troy E. Cilone, Deceased — PLAINTIFF

WILLIAM FRANKLIN FULKERSON, PAULINE FULKERSON and ALLSTATE INSURANCE COMPANY — INTERVENING PLAINTIFFS

vs.

FORD MOTOR COMPANY — DEFENDANT

MEMORANDUM IN SUPPORT OF POST-TRIAL MOTIONS

* * *

II. *The Court Should Enter Judgment Notwithstanding the Verdict for Ford on the Issue of Punitive Damages.*

Plaintiffs should not have been permitted to relitigate the issue of punitive damages. They withdrew their punitive damages claim under a threat of dismissal during the first trial and did not subsequently appeal that issue. Moreover, Plaintiffs' claim for punitive damages should have been dismissed on state and federal constitutional grounds and under the developing common law of Kentucky. Ford filed pre-trial motions requesting that Plaintiffs' punitive damages claims be dismissed, but they were denied. The arguments and authorities supporting Ford's position on these issues is set forth in Section III.A. of this memorandum, which by reference is incorporated herein and restated as if set forth in its entirety.

In addition, the Court's instructions to the jury on the issue of punitive damages failed to adequately instruct the jury on the law that controlled its deliberations, and failed to sufficiently limit the jury's discretion. In *Pacific Mut. Life Ins. Co. v. Haslip*, _____ U.S. _____, 111 S.Ct. 1032 (1991), the United States Supreme Court held that the jury instructions, in conjunction with Alabama's post trial review process, were constitutionally adequate, because the jury was carefully and expressly instructed on the purposes of punitive damages—punishment and deterrence. Thus, the jury's discretion to award punitive damages "was confined to deterrence and retribution, the state policy concerns sought to be advances." *Id.* The jury was expressly instructed to "take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." *Id.*

In this case, the instructions given to the jury contained *none* of the elements upon which the Supreme Court relied in *Haslip*. The jury was never instructed to take into account the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong. The jury instructions in this case *did not even mention* punishment and deterrence, the purposes of punitive damages—let alone confine the jury's discretion to those purposes.

Thus, in this case, unlike *Haslip*, the jury instructions imposed no significant limitations at all on the jury's discretion, either in awarding punitive damages or in determining the amount. Accordingly, the instructions in this case were inadequate under the federal and state constitutions and under the developing common law of Kentucky. Also, in support of its position on this point, Ford by reference incorporates its tendered instructions and the objections it stated on the record to the Court's instructions to the jury on the issue of punitive damages, and Ford restates its instructions and objections as if fully set forth herein.

* * *

III. ***Alternatively, the Court Should Order a New Trial of This Case on All Issues.***

* * *

E. Ford is Entitled to a New Trial Because of Errors of Law Occurring at the Trial and Objected to In the Admission of Evidence, the Exclusion of Evidence and the Instructions to the Jury.

* * *

Finally, the Court erred in submitting its instructions to the jury because they did not sufficiently instruct the jury on the law of the case or limit their discretion. In this regard, Ford incorporates by reference its tendered instructions and all objections it made to the Court's instructions on the record.

For all these reasons, Ford is entitled to a new trial under CR 59.01(h).

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS
NO. 93-CA-1365

FORD MOTOR COMPANY — APPELLANT

v.

WILLIAM FRANKLIN FULKERSON, PAULINE FULKERSON, ALLSTATE INSURANCE COMPANY and MELINDA HERRENSMITH, Individually, as Mother of Troy E. Cilone, Infant, and as Administratrix of the Estate of Troy E. Cilone, Deceased — APPELLEES

Appeal from Jefferson Circuit Court
Honorable Edwin A. Schroering, Jr.
Case No. 85-CI-06869

BRIEF OF APPELLANT, FORD MOTOR COMPANY

* * *

II. THE TRIAL COURT'S PROCEDURES FOR IMPOSING PUNITIVE DAMAGES VIOLATED DUE PROCESS, KENTUCKY COMMON LAW AND THE KENTUCKY RULES OF CIVIL PROCEDURE

Ford preserved the issues addressed in this section by tendering its own punitive damage instruction (TAPE No. 12; 01/21/93; 14:17:35; R. pp. 1060-66 [Appendix A-4]), by objecting to the punitive damage instruction given by the trial court (TAPE No. 12; 01/21/93; 15:16:25; R. pp. 1120-32 [Appendix A-3]), and by moving for a separate trial (R. pp. 733-38).

In *Pacific Mut. Life Ins. Co. v. Haslip*, 113 L.Ed.2d 1, 20 (1991), the United States Supreme Court "note[d] once again our concern about punitive damages that 'run wild.'" To address this concern, the Kentucky legislature in the Tort Reform Act, and other courts and legislatures across the country have required some combination of the following procedural protections: (1) instructions on the nature and purposes of punitive damages; (2) detailed instructions on the factors to be considered by the jury in assessing punitive damages; (3) precise definitions of the outrageous conduct necessary for an award of punitive damages; (4) proof of that conduct by clear and convincing evidence; and (5) bifurcated trials on compensatory and punitive damages.[4] After *Haslip* and *TXO Prod. Corp. v. Alliance Resources Corp.*, 125 L.Ed.2d 366 (1993), at least some of these procedures are unquestionably required by due process; they are all generally recognized as sound public policy; and they are all consistent with, if not required by, Kentucky law. They were all requested by Ford in this case.

Nevertheless, they were *all* rejected by the trial court. Thus, the case was tried as if the Supreme Court's concern about punitive damages were unwarranted; as if there were no recognized need to provide defendants with any procedural protections beyond those required for compensatory damages; and as if *Haslip* had never been decided. The predictable result was a punitive damage award "run wild," an award that taints the jury's finding on the dispositive issue of causation, and an

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[4] *See, e.g.*, KRS 411.184 (precise definition of standard, clear and convincing evidence); KRS 411.186 (instruction on factors); *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991)(instructions on nature and purposes of punitive damages); *Garner v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 909 (W. Va. 1991)(instruction on factors); *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 651 (Md. 1992)(precise definition of standard, clear and convincing evidence); *Hodges v. S. C. Toop & Co.*, 833 S.W.2d 896 (Tenn. 1992)(bifurcation; clear nd convincing evidence).

award that serves no purpose except to punish Ford for improving its product—and to deter others from doing the same.

A. ***The trial court erred in not instructing the jury on the nature and purposes of punitive damages.***

The trial court failed to instruct the jury on the nature and purposes of punitive damages, a basic instruction clearly required by due process. Thus, while the jury was expressly told that if they found "gross negligence" they could award punitive damages "in an amount at the discretion of the jury," those instructions *placed literally no limits on the jury's exercise of that discretion.*

In *Haslip*, the United States Supreme Court recognized that "unlimited jury discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." 113 L.Ed.2d at 20. However, the Court affirmed the punitive award in *Haslip* because the jury's discretion was *not* unlimited. Rather, the jury instructions in *Haslip* — although "bare bones" by any definition—specifically informed the jury that the purposes of punitive damages were punishment and deterrence. *Id.* at 20-21. Thus, the jury's exercise of discretion "was confined to deterrence and retribution, the state policy concerns sought to be addressed." *Id.* at 20.

The Kentucky Supreme Court has expressly recognized that the Court in *Haslip* "*held* that instructions to the jury *must* define the purpose of punitive damages as punishment to the wrongdoer and as a deterrent to wrongdoers and others from such activities in the future." *Hanson v. American Nat'l Bank & Trust Co.*, Ky., 844 S.W.2d 408, 416 (1992), *vacated* (apparently on other grounds), 125 L.Ed.2d 717 (1993). Thus, the trial court's failure to give such an instruction in this case—indeed, its failure to impose *any* restrictions at all on the jury's exercise of its discretion—was

reversible error and a violation of Ford's right to due process of law under the United States and Kentucky Constitutions. U.S. Const. amend. XIV, § 1; Ky. Const., § 2.

B. ***The trial court erred by not instructing the jury on any of the factors to consider in assessing punitive damages.***

The Court in *Haslip* approved a "bare bones" instruction on punitive damages, but only because Alabama procedures provided for post-trial judicial review designed to "ensure that the award does 'not exceed an amount that will accomplish society's goals of punishment and deterrence'" and to "make certain that the punitive damages are reasonable in their amount." 113 L.Ed.2d at 22. Absent this type of *quasi de novo* judicial review, due process—or at least sound public policy—requires that the jury itself be given detailed instructions on the factors to consider in determining the amount of punitive damages. *See, e.g., Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 109-10 (4th Cir. 1991)(where court cannot conduct *quasi de novo* review of punitive award, jury must be instructed on relevant factors); *Oberg v. Honda Motor Co.*, 851 P.2d 1084, 1099 (Or. 1993)(factors for determining proper amount of punitive damages should be applied by juries).

Detailed instructions to the jury on the relevant factors to consider are now required in Kentucky by the Tort Reform Act. KRS 411.186(2). Among the factors the jury must consider are the likelihood of harm, the degree of defendant's awareness of that likelihood, the profitability of the misconduct, the duration of the misconduct, and actions by the defendant to remedy the misconduct. Although the Tort Reform Act may not apply to cases such as this, which arose before the effective date of the act, the common law itself is clearly subject to further development by this Court and by the Kentucky Supreme Court in light of the sound public policy reflected in

that act. "The punitive damages system is a creature of the common law. Courts created it, courts developed it, and courts apply it. Courts can further refine it . . . ." M. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages In Modern Product Liability Litigation*, 40 **Ala. L. Rev.** 919, 921 (1989).

Thus, under *Haslip*, and the common law of Kentucky, the trial court reversibly erred in failing to instruct the jury on any of the factors that should guide its discretion in determining the amount of punitive damages.

* * *

D. ***The trial court erred by not requiring proof by clear and convincing evidence.***

About half of the states which allow punitive damages require proof by at least clear and convincing evidence, either by statute or by judicial decision. *See generally* V. Schwartz & M. Behrens, *Punitive Damage Reform—State Legislatures Can and Should Meet the Challenge Issued By The Supreme Court Of The United States In Haslip*, 42 **Am. U. L. Rev.** 1365, 1381 n.99 (1993)(collecting cases and statutes). The Kentucky Tort Reform Act expressly requires proof by clear and convincing evidence. KRS 411.184.

Kentucky courts are obviously free to interpret Kentucky common law to require clear and convincing evidence as a matter of common law, as have courts in many other states.[5]

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[5]*See, e.g., Hodges v. S. C. Toop & Co.*, 833 S.W.2d 896 (Tenn. 1992); *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633 (Md. 1992); *Masaki v. General Motors Corp.*, 780 P.2d 566 (Hawaii 1989); *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675 (Ariz. 1986); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982); *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437 (Wis. 1980).

> This higher standard of proof is appropriate given the twin purposes of punishment and deterrence: fairness requires that a defendant's wrong be clearly established before punishment, as such, is imposed; awarding punitive damages only in clearly appropriate cases better effects deterrence.

Hodges v. S. C. Toop & Co., 833 S.W.2d 896, 901 (Tenn. 1992). In fact, this Court and the Kentucky Supreme Court *routinely* require clear and convincing evidence in a variety of common law contexts in which the unfairness and social harm resulting from an erroneous verdict are less serious than a case of quasi-criminal punishment. For example, clear and convincing evidence is required by Kentucky common law to prove fraud, *Investors Heritage Life Ins. Co. v. Colson*, Ky. App., 717 S.W.2d 840, 842 (1986); to remove a judge from office for misconduct, *Starnes v. Judicial Retirement and Removal Comm'n*, Ky., 680 S.W.2d 922, 923 (1984); to overcome the presumption that a signed and delivered but unrecorded deed evidences an intent to transfer title, *Statewide Development Co. v. Lexington Fayette Urban Co. Gov't*, Ky. App., 821 S.W.2d 97, 100 (1991); to prove that property obtained during marriage is a personal gift and not marital property, *Browning v. Browning*, Ky. App., 551 S.W.2d 823, 825 (1977); and to prove an oral modification of a written contract, *Wehr Constructors, Inc. v. Steel Fabricators, Inc.*, Ky. App., 769 S.W.2d 51 (1988).

The private and public interests at stake in a punitive damage claim—the stigmatization of the defendant, the condemnation of an entire product line, the potential for deterring not only wrongful conduct but socially desirable conduct—more than rival the interests at stake in cases such as these. As the common law requires proof by clear and convincing evidence in other, less compelling circumstances, it also requires proof by clear and convincing evidence in this case. *See, e.g., Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633,

651 (Md. 1992)(collecting and discussing judicial decisions adopting clear and convincing standard for punitive damages).

* * *

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 93-CA-1365

FORD MOTOR COMPANY, APPELLANT

v.

WILLIAM FRANKLIN FULKERSON, PAULINE FULKERSON, ALLSTATE INSURANCE COMPANY and MELINDA HERRENSMITH, Individually, as Mother of Troy E. Cilone, Infant, and as Administratrix of the Estate of Troy E. Cilone, Deceased, APPELLEES

Appeal from Jefferson Circuit Court
Honorable Edwin A. Schroering, Jr.
Case No. 85-CI-06869

PETITION FOR REHEARING OF APPELLANT, FORD MOTOR COMPANY

* * *

INTRODUCTION

Four manifest errors clearly require this Court to rehear and reconsider its March 17, 1995 opinion and to reverse the judgment below. The trial court's punitive damages instruction did not satisfy the due process requirements of the Fourteenth Amendment, no evidence was introduced to support this Court's conclusion that Ford "knew of other incidents in which the shrink fit assembly failed," Ford was entitled a separate trial on when the wheel came off, pursuant to the mandatory

language of CR 42.02, and the NHTSA's final factual finding that there was no indication of a safety defect was admissible under KRS 803(8).

* * *

ARGUMENT

I.

THIS COURT'S OPINION IS DIRECTLY CONTRARY TO CONTROLLING DECISIONS OF THE UNITED STATES SUPREME COURT, WHICH HOLD THAT ARGUMENT OF COUNSEL CANNOT SUBSTITUTE FOR JURY INSTRUCTIONS REQUIRED BY DUE PROCESS.

The United States Constitution—specifically, the Fourteenth Amendment's Due Process Clause—*requires* that the jury's discretion to award punitive damages be limited by appropriate jury instructions. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Under *Haslip* and the Due Process Clause, jury instructions *must*, at a minimum, "define the purpose of punitive damages as punishment to the wrongdoer and as a deterrent to wrongdoers and others from such activities in the future . . . ." *Hanson v. American Nat'l Bank & Trust Co.*, Ky., 865 S.W.2d 302, 310 (1993). And yet, the trial court in this case gave literally no instruction on the purposes of punitive damages. In fact, while the punitive damage instruction told the jury that the amount of punitive damages was within their discretion, those instructions *placed literally no limits on the jury's exercise of that discretion.* (Tape No. 13; 01/22/93; 09:54:44; R. pp. 1120-32.)

Thus, there can be no serious dispute that the punitive damage instruction given by the trial court did not meet the requirements of due process. Nevertheless, this Court noted that Ford's counsel "took the opportunity to expand on the

instructions" and "informed the jury that punitive damages are assessed 'as a form of punishment where there has been outrageous conduct.'" (Slip op. at 9.) With no mention of due process or *Haslip*, this Court then held that the "punitive damage instruction submitted to the jury, *supplemented by counsel's closing argument*, met the 'bare bones' requirements of *Kentucky* [law]." (*Id.*, emphasis added.)

Kentucky law—the sole basis for this Court's decision—is irrelevant to Ford's argument under the United States Constitution. The issue is not what Kentucky's "bare bones" approach will tolerate, but what the Due Process Clause requires.[1] In fact, the United States Supreme Court has *twice* reminded Kentucky courts that, as a matter of constitutional law, "arguments of counsel cannot substitute for instructions by the court." *See Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978); *Carter v. Kentucky*, 450 U.S. 288, 304 (1981).

In *Taylor*, the Kentucky trial court failed to instruct the jury that the criminal defendant was presumed to be innocent. On appeal, this Court "rejected petitioner's presumption-of-innocence contention by citing Kentucky case law." 436 U.S. at 482-83. The Kentucky Supreme Court denied discretionary review, but the United States Supreme Court held that the presumption-of-innocence instruction was required by the Due

---

[1] Kentucky's "bare bones" approach does not excuse a complete failure to give a required instruction, such as occurred in this case. *See, e.g., Risen v. Pierce*, Ky., 807 S.W.2d 945 (1991)(general instruction that defendant had duty to exercise due care insufficient; trial court required to instruct on duties of driver approaching a one-lane bridge); *Audiovox Corp. v. Moody*, Ky. App., 737 S.W.2d 468 (1987)(in breach of contract case, trial court erred in failing to instruct jury that to award punitive damages it must find the defendant's conduct was tortious); *Edwards and Webb Constr. Co. v. Duff*, Ky. App., 554 S.W.2d 909 (1977)(trial court reversed where it failed to instruct jury that recovery could not exceed value of damaged building). Thus, this Court's conclusion is erroneous, even under Kentucky law.

Process Clause of the Fourteenth Amendment. *Id.* at 490. The Court expressly considered and rejected Kentucky's argument that the instruction was not required because counsel could and did address the issue in closing argument:

> The Commonwealth also contends that no additional instructions were required, because defense counsel argued the presumption of innocence in both his opening and closing statements. But arguments of counsel cannot substitute for instructions by the court. . . . It was the duty of the court to safeguard petitioner's rights, a duty only it could have performed reliably.

Id. at 488-89.

In *Carter*, the Kentucky trial court once again refused to give an instruction required by the Fourteenth Amendment (i.e., an instruction that the criminal defendant's failure to testify should not prejudice him). The Kentucky appellate courts affirmed, once again relying on Kentucky law. And once again, the United States Supreme Court reversed, holding that argument of counsel was insufficient to satisfy the trial court's "constitutional obligation" to give the instructions required by the Constitution:

> And most certainly, defense counsel's own argument [on the defendant's right not to testify] cannot have had the purging effect that an instruction from the judge would have had. "[Arguments] of counsel cannot substitute for instructions by the court."

450 U.S. at 304.

This case is indistinguishable from *Taylor* and *Carter*. In all three cases, Kentucky trial courts failed to give jury instructions required by the Fourteenth Amendment; defense

counsel addressed the subject matter of those instructions in argument to the jury; and Kentucky appellate courts relied on Kentucky law to justify the refusal to give those instructions. In *Taylor* and *Carter*, the United States Supreme Court reversed the Kentucky courts; it would do the same here if this case were before it.

Thus, the minimum relief to which Ford is unquestionably entitled is a new trial on all issues.[2]

* * *

[2] The new trial must be on all issues because there is a genuine question on liability and retrial on punitive damages alone would cause injustice. *See Pedigo v. Carey*, Ky., 650 S.W.2d 256, 258 (1983).

SUPREME COURT OF KENTUCKY
DOCKET NO. _____
COURT OF APPEALS CASE NO. 93-CA-1365

FORD MOTOR COMPANY — MOVANT

v.

WILLIAM FRANKLIN FULKERSON, PAULINE FULKERSON, ALLSTATE INSURANCE COMPANY and MELINDA HERRENSMITH, Individually, as Mother of Troy E. Cilone, Infant, and as Administratrix of the Estate of Troy E. Cilone, Deceased — RESPONDENTS

Appeal from Jefferson Circuit Court
Honorable Edwin A. Schroering, Jr.
Case No. 85-CI-06869

FORD MOTOR COMPANY'S
MOTION FOR DISCRETIONARY REVIEW

* * *

4. Discretionary review should be granted to resolve several issues of first impression regarding Kentucky's system for awarding punitive damages, particularly in product liability cases. First, the Court of Appeals' opinion adopts a pernicious punitive damage standard under which product improvements, without more, can be the basis for a punitive damage award—thereby deterring future product improvements and frustrating sound public policy. Second, the Court of Appeals' opinion adopts a rule that allows trial courts to delegate to counsel their

constitutional duty to provide jury instructions defining the permissible bases for awarding punitive damages, thereby violating express holdings of the United States Supreme Court. Third, the Court of Appeals' opinion adopts, for the first time, a common law rule allowing punitive damages to be based on a mere preponderance of the evidence, without even considering whether the Due Process Clause or Kentucky common law require a higher standard of proof. These rulings of the Court of Appeals, unless corrected by this Court, threaten to distort and render unconstitutional all punitive damage awards in Kentucky.

* * *

QUESTIONS OF LAW INVOLVED

* * *

2. Whether arguments of counsel are sufficient to satisfy the trial court's obligation, under the Due Process Clause and controlling United States Supreme Court decisions, to give jury instructions defining the only permissible bases for awarding punitive damages.

3. Whether the Due Process Clause or Kentucky common law requires clear and convincing evidence to support a claim for punitive damages.

* * *

REASONS WHY THE JUDGMENT SHOULD BE REVIEWED

* * *

II. THE COURT OF APPEALS' OPINION CREATES A RULE THAT ALLOWS TRIAL COURTS TO UNCONSTITUTIONALLY DELEGATE THEIR DUTY UNDER THE UNITED STATES CONSTITUTION TO INSTRUCT THE JURY ON THE PERMISSIBLE BASES FOR PUNITIVE DAMAGES.

The United States Constitution—specifically, the Fourteenth Amendment's Due Process Clause—requires that the jury's discretion to award punitive damages be limited by instructions that define the limits within which that discretion may be exercised. *See*, *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18-24 (1991). As this Court has recognized, *Haslip* and the Due Process Clause require, *at a minimum*, jury instructions that "define the purpose of punitive damages as punishment to the wrongdoer and as a deterrent to wrongdoers and others from such activities in the future." *Hanson v. American Nat'l Bank & Trust Co.*, Ky., 865 S.W.2d 302, 310 (1993). *Haslip* also requires at least some instructions on the factors for the jury to consider in assessing the amount of punitive damages. 499 U.S. at 19. Nevertheless, the trial court in this case refused Ford's request for such instructions and gave literally *no* instruction on the purpose of punitive damages and *no* instruction on the factors to consider in determining their amount. In fact, the punitive damage instruction (*See* Appendix A hereto) told the jury that the amount of punitive damages was within their discretion—but literally placed no limits on, and gave no guidance for, the jury's exercise of that discretion. (TAPE No. 13; 01/22/93; 09:54:44; R. pp. 1120-32.)

There can be no serious dispute that the punitive damage instruction given by the trial court did not even come close to meeting the requirements of due process, as defined by *Haslip*. Nevertheless, the Court of Appeals affirmed without even acknowledging the existence of *Haslip* or due process.

Instead, applying Kentucky law, the Court of Appeals observed that Ford's counsel had argued the purposes of punitive damages in closing argument, and it concluded that the "punitive damage instruction submitted to the jury, *supplemented by counsel's closing argument*, met the 'bare bones' requirements of *Kentucky*." (Slip. op. at 9, emphasis added.)

However, the United States Supreme Court has *twice* held, in cases arising from Kentucky, that under the United States Constitution "arguments of counsel cannot substitute for instructions by the court." *Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978); *Carter v. Kentucky*, 450 U.S. 288, 304 (1981). In *Taylor*, the Kentucky trial court failed to instruct the jury that the criminal defendant was presumed to be innocent, the Court of Appeals affirmed on the basis of Kentucky law, and this Court denied discretionary review. The United States Supreme Court reversed, holding that the presumption-of-innocence instruction was required by the Due Process Clause of the Fourteenth Amendment. 436 U.S. at 490. The Court expressly considered and rejected Kentucky's argument that the instruction was not required because defense counsel was free to address the issue in closing argument:

> The Commonwealth also contends that no additional instructions were required, because defense counsel argued the presumption of innocence in both his opening and closing statements. But arguments of counsel cannot substitute for instructions by the court. . . . It was the duty of the court to safeguard petitioner's rights, a duty only it could have performed reliably.

Id. at 488-89.

In *Carter*, the Kentucky trial court once again refused to give an instruction required by the Fourteenth Amendment

(i.e., an instruction that the criminal defendant's failure to testify should not prejudice him); the Kentucky appellate courts once again affirmed on the basis of Kentucky law; and the United States Supreme Court once again held that argument of counsel was insufficient to satisfy the trial court's "constitutional obligation":

> And most certainly, defense counsel's own argument [on the defendant's right not to testify] cannot have had the purging effect that an instruction from the judge would have had. "[A]rguments of counsel cannot substitute for instructions by the court."

450 U.S. at 304.

This case is indistinguishable from *Taylor* and *Carter*. In all three cases, Kentucky trial courts failed to give jury instructions required by the Fourteenth Amendment; in all three cases, defense counsel addressed the subject matter of those instructions in argument to the jury; and in all three cases Kentucky appellate courts held that Kentucky law justified the refusal to give those instructions. In *Taylor* and *Carter*, the United States Supreme Court reversed; the same principles require reversal here.

The Court of Appeals has fashioned a rule of Kentucky law that allows trial courts to delegate to counsel their constitutional duty to define the permissible bases of punitive damages. Unless corrected by this Court, this unconstitutional rule jeopardizes Kentucky's entire system of awarding punitive damages and plainly presents a special reason for this Court to grant discretionary review.

III. THE COURT OF APPEALS' OPINION HOLDS, FOR THE FIRST TIME, THAT PUNITIVE DAMAGES MAY BE AWARDED BASED ON A MERE PREPONDERANCE OF THE EVIDENCE, WITHOUT EVEN CONSIDERING WHETHER CLEAR AND CONVINCING EVIDENCE IS REQUIRED BY DUE PROCESS AND KENTUCKY COMMON LAW.

Before this case, neither this Court nor the Court of Appeals had defined the standard of proof necessary to support a claim for punitive damages. Ford argued below that due process and Kentucky common law required Plaintiffs to prove their claim for punitive damages by clear and convincing evidence. The Court of Appeals, however, effectively ruled, for the first time, that preponderance of the evidence is the applicable standard. It did so, moreover, without even discussing due process or the common law. Instead, it rejected Ford's arguments simply because Ford agreed that the 1988 Kentucky Tort Reform Act, which now requires clear and convincing evidence, did not apply because this case arose before the effective date of that Act. (Slip op. at 10.)

Whether the Kentucky Tort Reform Act applies has no bearing on whether due process requires clear and convincing evidence.[3] Further, the common law of Kentucky is clearly

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[3] In dictum in *Haslip*, the Court commented that clear and convincing evidence was not required where a lesser standard is "buttressed, as it is, by the procedural and substantive protections [provided by Alabama law]." *Id.* at 23 n.11. These procedural and substantive protections included instructions on the purposes of punitive damages, instructions on the factors to be considered in determining the amount of a punitive award, exclusion of all evidence of the defendant's wealth, and *quasi de novo* post-trial judicial review. 499 U.S. at 19-22. Absent these protections, due process requires comparable safeguards, including proof by clear and convincing evidence. *Cf. Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 109-10 (4th Cir. 1991)(where court cannot conduct *quasi de novo* review of punitive award, additional jury instructions required).

subject to development by the courts, especially in light of the sound public policy reflected in that Act. Thus, this case presents this Court with the opportunity to address whether, in light of punitive damage developments in recent years, this Commonwealth should follow the lead of numerous other jurisdictions and hold that common law principles require that punitive damages be proved by clear and convincing evidence.[4]

Although this is an issue of first impression in Kentucky, this Court and the Court of Appeals have, without hesitation, required clear and convincing evidence as a matter of common law when necessary to avoid the risk of unfair or harmful erroneous verdicts. For example, clear and convincing evidence is required by Kentucky common law to prove fraud, (*Investors Heritage Life Ins. Co. v. Colson*, Ky. App., 717 S.W.2d 840, 842 (1986)); to overcome the presumption raised by a signed and delivered deed, (*Statewide Dev. Co. v. Lexington Fayette Urban County Gov't*, Ky. App., 821 S.W.2d 97, 100 (1991)); to prove that property obtained during marriage is a personal gift, (*Browning v. Browning*, Ky. App., 551 S.W.2d 823, 825 (1977)); and to prove an oral modification of a written contract, (*Wehr Constructors, Inc. v. Steel Fabricators, Inc.*, Ky. App., 769 S.W.2d 51 (1988)). The public and private interests at stake in punitive damages claims are equally important and equally deserving of the important safeguard against erroneous verdicts provided by the clear and convincing standard. Ford respectfully requests this Court to grant discretionary review to decide this important issue of first impression.

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[4] *See, e.g., Hodges v. S. C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992); *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633 (Md. 1992); *Masaki v. General Motors Corp.*, 780 P.2d 566 (Hawaii 1989); *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675 (Ariz. 1986); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982); *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437 (Wis. 1980).

* * *

(2)

No. 95-1516

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

FORD MOTOR COMPANY,

Petitioner,

v.

WILLIAM FRANKLIN FULKERSON, PAULINE FULKERSON, ALLSTATE INSURANCE COMPANY and MELINDA HERRENSMITH, Individually And As Mother Of Troy E. Cilone, Infant, and As Administratrix of the Estate of Troy E. Cilone, Deceased,

Respondents.

On Petition for Writ of Certiorari to the Kentucky Court of Appeals

---

BRIEF IN OPPOSITION

A. CAMPBELL EWEN
EWEN, HILLIARD & BUSH
1090 Starks Building
Louisville, KY 40202
Counsel for Allstate Insurance

KENNETH L. SALES *
SEGAL, ISENBERG, SALES, STEWART, CUTLER & TILLMAN
2100 Waterfront Plaza
325 West Main Street
Louisville, KY 40202
(502) 568-5600
Counsel for William and Pauline Fulkerson

WILLIAM A. MILLER, JR.
17th Floor
Kentucky Home Life Building
239 S. 5th Street
Louisville, KY 40202
Counsel for Melinda Herrensmith

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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LIST OF INTERESTED PARTIES

The Petitioner is Ford Motor Company.

The Respondents are William Franklin Fulkerson, Pauline Fulkerson, Allstate Insurance Company, and Melinda Herrensmith, Individually, as mother of Troy E. Cilone, Infant, and as Administratrix of the Estate of Troy E. Cilone, Deceased. Kenneth L. Sales of Segal, Isenberg, Sales, Stewart, Cutler & Tillman is counsel of record for all Respondents. William A. Miller, Jr., is also counsel for Respondents, Melinda Herrensmith, Individually, as mother of Troy E. Cilone, Infant, and as Administratrix of the Estate of Troy E. Cilone, Deceased. A. Campbell Ewen of Ewen, Hilliard & Bush, is also counsel for Respondent, Allstate Insurance Company.

Each of the Respondents fully join in this Brief in Opposition, except Allstate. Allstate Insurance Company's position with respect to punitive damage is already a matter of record with this Court and remains unchanged. In this particular case, Allstate takes no position with respect to punitive damages, having been awarded none. No issues remain concerning liability and compensatory damages and Petitioner raises none here.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1516

FORD MOTOR COMPANY,

Petitioner,

v.

WILLIAM FRANKLIN FULKERSON, PAULINE FULKERSON, ALLSTATE INSURANCE COMPANY and MELINDA HERRENSMITH, Individually And As Mother Of Troy E. Cilone, Infant, and As Administratrix of the Estate of Troy E. Cilone, Deceased,

Respondents.

On Petition for Writ of Certiorari to the Kentucky Court of Appeals

---

BRIEF IN OPPOSITION

Respondents request the court deny the Petition for Writ of Certiorari seeking review of an unreported opinion of the Kentucky Court of Appeals. (For the convenience of the Court, all citations to the opinion will be to the opinion attached as App. 1a-10a to the Petition.)

COUNTER STATEMENT OF THE CASE

Petitioner commits the common mistake of reciting the evidence most favorable to its position, which the jury quite evidently did not believe, while ignoring contrary evidence that amply supports the jury verdict. Of particular importance, the record contains the following key evidence:

A. The Accident

In the early morning of June 2, 1985, seventeen-year-old Troy Cilone lost control of the 1984 Ford Ranger he was driving and crossed the center line into the path of the truck driven by William Fulkerson.[1] Cilone was killed and Fulkerson seriously injured, incurring medical expenses in excess of seventy-four thousand dollars ($74,000.00). A passenger in Cilone's vehicle testified he heard a loud noise, then heard Cilone shout, prior to loosing control of the Ranger. (Tape No. 2; 1/06/93; 10:32:50).

As the Kentucky appellate courts recognized in both the first and second trial of this action, Respondents presented ample evidence that the Ranger's left front wheel assembly separated from the vehicle prior to the collision. Five independent expert witnesses from the police department and coroner's office, conducted an official investigation of the scene immediately following the collision. Each concluded, based upon substantial physical evidence,[2] that

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[1] Ford notes the "closing speed" of the vehicles was between 80-90 mph. (Pet., p. 1). The closing speed was determined by combining the speeds of the vehicles at the time of the collision. Ford's accident reconstructionist estimated the Ranger to be traveling approximately 45 mph and Fulkerson's vehicle, approximately 35 mph, at the time of the accident. (Tape No. 11; 01/20/93; 16:19:55).

[2] A published opinion of the Kentucky Supreme Court resulting from the first trial described the "substantial evidence" introduced by the Plaintiffs at that trial. *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991). Substantial physical evidence at the scene included: various gouge and scrape marks on the roadway, running in the same direction the Ranger traveled, between 100 and 200 feet before the point of impact (Tape No. 2; 01/06/93; 13:46:50; 14:22:30; 16:37:5; Tape No. 5; 01/11/93; 15:29:44; 14:39:39); a brake shoe from Cilone's left front wheel found 198 feet prior to the point of impact (Tape No. 2; 01/06/93; 14:23:26); and other pieces of Cilone's vehicle, including rim pieces, a brake caliper arm, and wheel chrome, found at distances from 47 feet 7 inches to 152 feet 4 inches prior to the point of impact. (Tape No. 5;

the Ranger's wheel assembly was defective, causing the left front wheel to separate from Cilone's vehicle prior to impact. (Tape No. 2; 01/06/93; 14:40:39; Tape No. 3; 01/07/93; 11:36:30; Tape No. 4; 01/08/93; 09:09:40). Testimony of Ford's experts supported this conclusion.[3]

As the Kentucky appellate courts further recognized, Respondents produced ample evidence that the Ranger's left front wheel assembly separated because the wheel assembly was defectively designed and/or defectively manufactured.[4] In addition to the conclusions of five independ-

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01/11/93; 14:31:02). Dr. Alan Johnson, a metallurgist at the University of Louisville working with the coroner's office, also found extensive corrosion, pre-dating the collision, on the Ranger's spindle stem. (Tape No. 4; 01/08/93; 09:07:36).

[3] Ford expert, Richard Eisenberg, first testified the gouges and scrape marks observed by police and coroner's agents were not relevant to the determination of when the spindle separated from the vehicle. (Tape No. 11; 01/20/93; 14:17:40; 14:20:50; 14:25:00). On cross-examination, however, Respondents introduced deposition testimony from another action involving the wheel separating from a Ford Ranger in which Eisenberg used the lack of scrapes and gouges on the roadway to support his conclusion that the spindle did not separate prior to impact. *Scherer v. Ford Motor Co.*, Civil Action No. CV-91-B-00860-J, N.D. Alabama, Jasper Division. (Tape No. 11; 01/20/93; 14:21:27).

Ford employee and expert, James Varin, conceded gouges and scrape marks on the roadway were relevant to the determination of when the spindle separated, but admitted he did not consider this evidence in forming his opinion in this case. In fact, Varin testified he never looked at any photographs of the gouges and scrape marks on the roadway resulting from this accident prior to trial. (Tape No. 10; 01/19/93; 14:07:14).

[4] Petitioner notes the jury in the first trial returned a verdict in favor of Ford. Petitioner ignores, however, three very critical factors regarding the first trial: (1) the prior jury received improper instructions as to the criteria for finding a design defect; (2) the judge in the first trial improperly excluded evidence of design changes in the Ford Ranger's wheel assembly; and (3) Respondent did not discover, until after the first trial, the existence of design change request forms which demonstrated Ford's

ent experts from the police and coroner's office, Respondents presented the testimony of two expert engineers. Larry Bihlmeyer, a former Ford engineer involved in the development of the shrink-fit assembly designed for the Ford F-Series pickup and used on the Ford Ranger,[5] and John Stilson, another former Ford employee, likewise opined that the Ranger's wheel assembly was defectively manufactured and designed.[6]

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awareness of the risk attributable to the absence of a secondary retention feature. *Fulkerson, supra.* Evidence at the second trial was so overwhelming the jury unanimously determined the accident was caused by the defective wheel assembly of Cilone's Ford Ranger. (App. A).

[5] Ford notes "there was no evidence that *any* shrink-fit joint in *any* F-Series Truck had *ever* failed under *any* circumstances." (Pet., p. 2). Ford fails to mention, however, that the spindle stem used on the shrink-fit joint of the F-Series pickup contained a "nail head" secondary retention feature lacking on the shrink-fit assembly of the Ford Ranger.

[6] Bihlmeyer identified two design defects in the Ranger's wheel assembly: (1) the spindle shaft lacked a shoulder or head to insure retention of the spindle in the assembly (Tape No. 4; 01/08/93; 13:25:10), and (2) the area of the shrink-fit was too small, and therefore insufficient to provide the needed grip between the spindle shaft and assembly. (Tape No. 4; 01/08/93; 13:25:22). Bihlmeyer also testified as to five manufacturing defects: (1) the area of the shrink-fit was smaller than required by Ford's printed specifications; (2) Ford failed to properly test the spindle and wheel assembly in light of actual manufacturing specifications; (3) Ford violated its own standards, as well as generally accepted industry standards by failing to eliminate the hazard; (4) if the potential hazard from the lack of a secondary retention feature could not be eliminated through design or manufacturing changes, Ford failed to follow standard engineering practice in warning the public of the potential hazard; and (5) Ford failed to follow proper practices when Ford engineers foresaw and recognied the defect, but failed to correct it. (Tape No. 4; 01/08/93; 13:25:43).

Stilson, engineer, accident reconstructionist and former Ford employee, also concluded, based upon the physical evidence, that the Ranger's left front wheel assembly separated prior to impact as a result of Ford's defective manufacture and design. (Tape No. 6; 01/12/93; 11:13:20).

Ford entirely mischaracterizes the record with regard to the evidence presented in support of Respondent's claims for punitive damages. Ford would have this court believe the only evidence presented to show Ford acted with a wanton or reckless disregard for the safety of others was evidence that Ford subsequently improved its product to make it safer. The Kentucky appellate court recognized Respondents produced ample evidence that Ford knew, prior to the accident in this case, there existed a risk of wheel separation owing to the absence of a secondary retention feature.[7] Bihlmeyer testified Ford engineers involved in the design knew of the risk inherent in the shrink-fit process used to hold the spindle and wheel assembly, and incorporated the "nail head," as a secondary retention method. (Tape No. 4; 01/08/93; 11:09:31). In fact, while employed at Ford, Bihlmeyer was specifically instructed that no shrink-fit design should be developed without the "nail head" or some other secondary retention device. (Tape No. 4; 01/08/93; 13:29:01; 15:03:40).

Indeed, Ford initially designed the Ranger with a secondary retention feature, but eliminated the feature prior to manufacture in order to save production costs.[8] (Tape

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[7] The Kentucky trial court and court of appeals both considered and rejected Ford's argument concerning the sufficiency of the evidence. The trial court recognized Plaintiffs presented evidence that Ford knew of the risk inherent in the shrink-fit assembly, but chose to manufacture the vehicle without a secondary retention feature for cost saving purposes, despite the availability of a safer design. The trial court concluded the evidence sufficient to support the jury's award of punitive damages. (Pet. App. 11a-12a). In reviewing this case, the court of appeals unanimously concurred. (Pet. App. 6a-10a).

[8] Ford began changing the design of the Ranger's wheel assembly almost immediately after production began in 1982. (Tape No. 11; 01/20/93; 10:21:57). Ford changed the design two or three times between 1984 and 1988. (Tape No. 11; 01/20/93; 10:34:37). Respondents introduced product change request forms from Ford stating the change was requested because there was "no head on stem" and that the stem was being "swaged over to provide a

No. 4; 01/08/93; 13:49:05). Ford later (after sale of the Ranger involved in this case, but prior to the collision) redesigned the wheel assembly to include a secondary retention feature. Ford's own expert, James Varin, a Ford employee who described his job as "analyzing parts that may be the subject of [legal] claims," admitted the primary reason for changing the spindle design was to reduce Ford's liability exposure in the event of wheel separation.[9] Ford refused, however, to recall cars previously sold to install a safer design or to warn consumers who purchased these vehicles of the risk of wheel separation.

B. The Punitive Damage Instruction

Because this accident occurred in 1985, the court gave a punitive damage instruction based upon common law. In 1988, the Kentucky legislature enacted a punitive damage statute supplanting common law as to all accidents occurring after the statute's enactment. (App. B). Ford claims Kentucky's "traditional" (pre-1988) punitive damage instruction failed to satisfy the Due Process Clause of the Fourteenth Amendment to the United States Constitution. To preserve this issue for appeal, Ford tendered what they claimed was a proper instruction on punitive damages.

As the Kentucky Supreme Court recognized in its opinion reversing the first trial of this action, Kentucky takes a "bare bones" approach to jury instructions. *Fulkerson*, 812 S.W.2d at 122. The court explained:

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stem retention feature." Ultimately, Ford redesigned the Ranger's spindle stem to include the "nail head" featured on the original design. (Tape No. 4; 01/08/93; 11:36:56).

[9] Varin initially testified the primary reason for changing the spindle design was the cheaper manufacturing process. On cross-examination, Varin admitted testifying in *Scherer, supra* (another action involving wheel separation on a Ford Ranger), that the primary impetus for adding the secondary retention feature was *strictly* for purposes of post accident investigation. (Tape No. 10; 01/19/93; 11:45:40; 11:47:04).

> Unlike many jurisdictions that use pattern instructions, and otherwise explain the law of the case to the jury, the practice in Kentucky abjures the abstract and requires the trial court, applying (rather than stating), the underlying legal principles, to frame the dispositive issues.
>
> > 'Our approach to instructions is that they should provide only the bare bones, which can be fleshed out by counsel in their closing arguments if they so desire.' *Id.* (*Citing, Cox v. Cooper*, 510 S.W.2d 530, 535 (Ky. 1974)).

In accordance with this practice, at the second trial the court gave a punitive damage instruction which framed the issue for the jury to decide as whether the accident was caused by the gross negligence of Ford.[10] The instruction defined "gross negligence" and explained that if they found Ford acted in such a manner, the jury, in their discretion, could award punitive damages. Pursuant to Kentucky law, Respondents were required, prior to trial, to specify the amount of punitive damages claimed in response to interrogatories submitted by Ford. Ky. R. Civ. P. 8.01. Accordingly, the verdict form limited the jury's award to an amount not exceeding $2,000,000 for each plaintiff. (App. A). Counsel for

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[10] The court gave the following instruction on punitive damage:

If you find for the Plaintiffs, Fulkerson and Herrensmith, against the Ford Motor Company under Instruction One, and if you are further satisfied from the evidence that the accident was caused by gross negligence on the part of Ford Motor Company, you may in your discretion award punitive damages against Ford Motor Company in addition to the damages otherwise authorized under these instructions in an amount at the discretion of the jury. If you award punitive damages, you will state the amount separately from the sum or sums awarded under any other instruction, and you may use Verdict Form G for this purpose.

"Gross negligence" means a wanton or reckless disregard for the lives and safety of other persons, including the Plaintiffs, or a willful or malicious act.

each party discussed the instructions in closing argument. All three counsels agreed to the underlying purpose of awarding punitive damages and explained to the jury that punitive damages are designed to punish those who engage in outrageous conduct and to act as a deterrent to discourage others from engaging in the same type of conduct in the future. (App. D).

REASONS FOR DENYING THE WRIT

This Court should deny Ford's Petition for Writ of Certiorari for the following reasons:

1. The issue presented in this case has no precedential importance. Kentucky altered its approach to punitive damages by enacting a statute in 1988 which contains all the features Petitioner advocates. It is, therefore, likely that this is the last pre-1988 accident governed by the pre-statutory "bare bones" approach to punitive damages.

2. In any event, Kentucky's pre-1988 procedures were consistent with this Court's holdings in *Haslip* and comport with due process.

3. Petitioner does not challenge the *amount* of punitive damages awarded as constitutionally excessive (it was roughly double the compensatory damages, and Ford itself suggested a three time compensatory multiplier). Thus, this case has no relation to the issue posed in *BMW v. Gore*.

I. THIS CASE LACKS ANY PRECEDENT SETTING VALUE IN THAT THE PUNITIVE DAMAGE INSTRUCTION GIVEN HERE APPLIED A PREVIOUS LAW OF KENTUCKY CONCERNING PUNITIVE DAMAGES ALTERED BY STATUTE IN 1988.

The punitive damage instruction given in this case applied a former rule of Kentucky law, unique to the state, which no longer exists and is unlikely to be raised in any other case. The accident, which is the subject of this case, took place in 1985. It was, therefore, stipulated by

all counsel that this case was governed by the punitive damage standards employed by Kentucky prior to 1988. (Pre-trial conference; Tape 30-12-92 VCR 100; 12/11/92; 16:41:34).

In 1988, Kentucky enacted a punitive damage statute supplanting common law as to all subsequent accidents. The statute requires proof "by clear and convincing evidence that the Defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice." Ky. Rev. Stat. § 411.184. (App. B). A companion statute, Ky. Rev. Stat. § 411.186, establishes the procedures for imposing punitive damages and requires the issue of punitive damages be tried concurrently with all other issues presented in the case. (App. C). The statute defines oppression, fraud and malice and specifies punitive damages are "awarded against a person to punish and discourage him and others from similar conduct in the future." The statute further delineates the "factors" to be considered by the jury in determining the amount of punitive damages if warranted.[11] Finally, the statute declares it "supersedes any and all existing statutory or judicial law in so far as such law is inconsistent with the provisions of this statute." (App. B).

Kentucky courts now specifically instruct juries on the terms of the statute. *Hanson v. American National Bank*

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[11] Ky. Rev. Stat. § 411.186(2) provides in part as follows:

(2) If the trier of the fact determines that punitive damages should be awarded, the trier of fact shall then assess the sum of punitive damages. In determining the amount of punitive damages to be assessed, the trier of fact should consider the following factors: (a) the likelihood at the relevant time that serious harm would arise from the defendant's misconduct; (b) the degree of the defendant's awareness of that likelihood; (c) the profitability of the misconduct to the defendant; (d) the duration of the misconduct and any concealment of it by the defendant; and (e) any actions by the defendant to remedy the misconduct once it became known to the defendant. (App. C).

and Trust Co., 865 S.W.2d 302, 310 (Ky. 1993). Petitioner does not contend Kentucky's statutory procedure falls short of the requirements of due process. Indeed, it is evident the statute goes far beyond the requirements identified in this Court's decisions. The statute contains the very safeguards which Petitioner claims lacking in Kentucky's former procedure: a statement of the purposes of punitive damages; an enumeration of the criteria for determining entitlement to, and the amount of punitive damages; a requirement that entitlement to punitive damages be proved by clear and convincing evidence; and omission of the wealth of the Defendant as a factor in determining punitive damages.[12]

While we believe the procedures in the instant case (not governed by statute) satisfied due process, see Part II, *infra*, a decision respecting that issue would have no precedential importance for the future of Kentucky law, whose cases are now governed by the statute. Because Kentucky has a one-year statute of limitations for personal injury cases, it is doubtful there exist any other pre-1988 accident cases still pending. Moreover, we are aware of no other state that presently follows Kentucky's former procedure with regard to punitive damages, and Petitioner cites none. A decision in this case would have no precedential value elsewhere, either.[13]

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[12] In *Hanson*, the Kentucky Supreme Court expressly declared trial courts are not to suggest factors to the jury beyond those mentioned in the statute. Further, the statute allows only evidence of profitability of the misconduct, and not the wealth of the Defendant. 865 S.W.2d at 310.

[13] In an attempt to make this case seem worthy of certiorari, the Petition contains a lengthy critique of the procedures employed in a variety of other states. It is self-evident those procedures differ from the former Kentucky procedure. It is also self-evident that the scope of post-verdict review (which Petitioner contends is inter-dependent with the adequacy of jury instructions) will vary from state-to-state. If there are problems in other states, they ought to be addressed in cases coming from those states, not by some direction from the review of a former Kentucky procedure which is now defunct.

II. KENTUCKY'S PRE-1988 PROCEDURES FOR IMPOSING PUNITIVE DAMAGES WERE ENTIRELY CONSISTENT WITH THIS COURT'S HOLDINGS IN *HASLIP* AND COMPORT WITH DUE PROCESS.

Apart from the obsolescence of the issues presented in this case, they would not, in any event, warrant this Court's attention. Petitioner complains in this case, unlike *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), the trial court did not instruct the jury that the purposes of punitive damages are to punish and deter. Under Kentucky's pre-1988 "bare bones" approach, however, the legal principles underlying the instructions "can be fleshed out by counsel in their closing arguments if they so desire." *Fulkerson*, 812 S.W.2d at 122. In this case, not only did Petitioner's counsel tell the jury that the purposes of punitive damages are to punish and deter, so did counsel for each of the Respondents. (App. D). Thus, the jury received unanimous advice from counsel for all parties that the purposes of punitive damages are to punish and deter, fulfilling exactly what this Court, in *Haslip*, ruled the jury should know.

Petitioner cites *Carter v. Kentucky*, 50 U.S. 288 (1981), and *Taylor v. Kentucky*, 436 U.S. 478 (1978), two decisions of this Court from criminal cases, holding the opportunity for counsel to "flesh out" or supplement the Judge's charge does not cure a constitutionally inadequate jury instruction. Assuming *arguendo* the principle applies equally to punitive damage cases, Petitioner ignores a crucial distinction between this case and the two cited: In *Carter* and *Taylor*, counsel for the prosectuion did not confirm the accuracy of the statements by defense counsel, thus leaving the possibility the jury would doubt their accuracy. In this case, Ford's counsel explained to the jury, in closing arguments, the purpose of punitive damages was to punish and deter. In their closing, counsel for Respondents expressly agreed the explanation provided by Petitioner's counsel was a correct statement of law. Counsel for both, Fulkerson and

Herrensmith, expounded in detail upon the proper underlying principles of punitive damages. (App. C). There is no doubt the jury knew, after these arguments, what the underlying public policy or principles were for awarding punitive damages.

Petitioner further argues the Constitution requires more elaborate punitive damage instructions here than in *Haslip*, because Kentucky courts do not provide the same degree of independent judicial scrutiny of the adequacy of the jury's verdict as Alabama. As demonstrated by the court's decision in *Hensley v. Paul Miller Ford, Inc.*, 508 S.W.2d 759 (Ky. 1974), Kentucky courts provide a very detailed post-verdict review of challenged punitive damage awards. In *Hensley*, the jury returned a verdict in favor of the plaintiff, awarding $2,102.85 in compensatory and $20,000 in punitive damages. The defendant moved for a judgment notwithstanding the verdict as to the award of punitive damages. The trial court sustained the motion, holding the evidence fell short of the requirements necessary to sustain a verdict for punitive damages. The judge also conditionally granted defendant's motion for a new trial on punitive damages in the event the judgment notwithstanding the verdict was later reversed. The Kentucky Supreme Court reversed the trial court's decision concerning the sufficiency of the evidence to support an award of punitive damages. The court upheld, however, the trial court's decision granting a new trial on the excessive nature or the punitive damage award. The court recognized that the juries possess wide discretion in awarding punitive damages, but held:

> Litigants must not be left . . . to their arbitrary will, and be without remedy in cases where verdicts can be accounted for only upon the theory that they are the result of an improper sympathy, or unreasonable prejudice. In such cases it is one of the highest duties of a court to interfere; otherwise great wrongs will often result, and the party be remediless. 502 S.W.2d at 763-64.

Petitioner also ignores the explicit finding of the trial judge, in this case ruling on Petitioner's "Motion for Independent Review of the Punitive Damage Award" (Pet. App. 12a), that the facts of this case support the punitive damages award under "the standards in *Pacific Mutual Life Insurance Co. v. Haslip* . . ." (Pet. App. 12a). Clearly, the post-verdict review here was constitutionally adequate.

Petitioner's peroration about the impropriety of considering the wealth of the defendant in determining the amount of punitive damages has no application to this case. The trial judge did not instruct the jury to consider Ford's wealth, nor did counsel for Respondents invite the jury to do so. Indeed, Kentucky law in effect prior to 1988 prohibited introduction of such evidence. *Hensley*, 508 S.W.2d at 759.

Finally, Petitioner's contention that punitive damages should be dependent upon proof of wrongdoing by clear and convincing evidence was expressly rejected by this Court in *Haslip*, 499 U.S. at 23, n.11. As Kentucky now requires proof by clear and convincing evidence (App. B), this is hardly the case to revisit that ruling.

III. AS PETITIONER HAS NOT CHALLENGED THE AMOUNT OF PUNITIVE DAMAGES AWARDED AS CONSTITUTIONALLY EXCESSIVE, THIS CASE HAS NO RELATION TO ANY ISSUES RAISED IN *BMW v. GORE*.

Petitioner does not contend the *amount* of punitive damages awarded in this case is constitutionally excessive. As the amount is less than two times the compensatory damages awarded, and the misconduct here substantial (it hardly needs elaboration that a knowing failure of an automobile manufacturer to take precautions against the separation of wheels from its vehicles warrants strong punishment and deterrence),[14] any such contention would be

[14] Ford erroneously asserts throughout its Petition that Plaintiffs only evidence to support an award of punitive damages was the

specious. Indeed, Petitioner itself proposed a jury instruction indicating the propriety of a *treble* damage punitive award. (Pet. App. 38a). It follows then, that there is no reason for this Court to hold the Petition in this case pending a decision in *BMW of N. Am., Inc. v. Gore*, 115 S. Ct. 932 (1995), which involves only the constitutional limits on the amount of punitive damages, nor to remand this case for further consideration in light of whatever decision is rendered in *Gore*.[15]

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design change. As both the trial court and the court of appeals recognized, Plaintiffs presented evidence, through expert testimony of a former Ford employee and product-change request forms generated by Ford, that Ford knew a secondary retention feature was necessary to prevent separation of the spindle assembly. (Pet. App. 6a-7a, 11a-12a). Plaintiffs presented evidence that Ford knew of other claims that the shrink-fit assembly failed and recognized the need to alter the design to add a secondary retention feature in product request forms. This evidence is sufficient to support the jury's finding that the accident resulted from Ford's gross negligence in manufacturing a defective product and intentionally electing not to correct the defect or warn the public of the risk of separation. (Pet. App. 11a). The court of appeals unanimously concurred with the trial court's opinion that the record contained ample evidence to support an award of punitive damages. (Pet. App. 10a).

[15] Ford claims, under Kentucky law, reversal of the punitive damage awards in this case requires the reversal of the compensatory awards as well. This is a gross misstatement of Kentucky law. Kentucky courts have "*long* endorsed the view that damages may be separated from liability and that a case may be properly remanded for retrial of damages only." (Emphasis added). *Turfway Park Racing Assoc. v. Griffin*, 834 S.W.2d 667, 672 (Ky. 1992) (*Citing, Phipps v. Bisceglia*, 383 S.W.2d 367 (Ky. 1964); *Nolan v. Spears*, 432 S.W.2d 425 (Ky. App. 1968)).

In *Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980), the Kentucky Supreme Court held as a general rule a limited retrial *should* be granted. The court held "where a distinct and severable issue is to be decided, a trial on that issue alone is appropriate unless such a retrial would result in injustice." *Id.* at 146. This rule prevents a party who has already had his day in court on a particular issue from relitigating the same issue. *Scuddy Mining Co. v. Couch*, 295 S.W.2d 553, 554 (Ky. 1956). Only in cases involving inadequate damages, where liability is unclear, must the case be remanded for

CONCLUSION

Ford's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

A. CAMPBELL EWEN
EWEN, HILLIARD & BUSH
1090 Starks Building
Louisville, KY 40202
Counsel for
Allstate Insurance

KENNETH L. SALES *
SEGAL, ISENBERG, SALES,
STEWART, CUTLER & TILLMAN
2100 Waterfront Plaza
325 West Main Street
Louisville, KY 40202
(502) 568-5600
Counsel for William and
Pauline Fulkerson

WILLIAM A. MILLER, JR.
17th Floor
Kentucky Home Life Building
239 S. 5th Street
Louisville, KY 40202
Counsel for
Melinda Herrensmith

* Counsel of Record

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retrial on all issues. *Nolan*, 432 S.W.2d at 427. A verdict awarding inadequate damages is regarded as representing a compromise on liability, so as to taint the entire verdict and require a new trial on all issues. *Id.*

Pedigo v. Carey, 650 S.W.2d (Ky. 1983), cited by Ford in support of its argument for a new trial on all issues, involved an appeal of an inadequate damage award where liability was contested, and as such, has no application to this case. The issue of damages is distinct and severable from the issue of liability and compensatory damages in this case. Ford already had its day in court on those issues and there is no reason to allow it to try them again. As Ford recognized in its motion for separate trials on the issues of causation and punitive damages, they are distinct and severable issues. Any retrial would be limited to punitive damages. *See also, Smith v. McMillan*, 841 S.W.2d 172 (Ky. 1992); *Beckner v. Palmore*, 719 S.W.2d 288 (Ky. App. 1986); *Phipps v. Winkler*, 715 S.W.2d 893 (Ky. 1986).

APPENDIX A

INSTRUCTION NO. SEVEN

If you find for the plaintiffs Fulkerson and Herrensmith against the Ford Motor Company under Instruction One, and if you are further satisfied from the evidence that the accident was caused by gross negligence on the part of Ford Motor Company, you may in your discretion award punitive damages against Ford Motor Company in addition to the damages otherwise authorized under these instructions in an amount at the discretion of the jury. If you award punitive damages, you will state the amount separately from the sum or sums awarded under any other instruction, and you may use Verdict Form G for this purpose.

"Gross Negligence" means a wanton or reckless disregard for the lives and safety of other persons, including the plaintiffs, or a wilful or malicious act.

/s/ Edwin A. Schroering, Jr.
EDWIN A. SCHROERING, JR.
Judge

Date: 1-27-93

VERDICT FORM B

After considering the evidence the jury answers interrogatory under verdict form B, as follows:

Do you believe from the evidence that Troy Cilone failed to perform any of his duties, required of him under Instruction No. Two, and such failure was a substantial factor in causing the accident.

___ YES ___X NO

/s/ [Illegible]
Foreperson (If Unanimous)

VERDICT FORM D

We, the jury, find for the plaintiffs and against the defendant Ford Motor Company under Instruction No. Four and award damages as follows:

I. For Melinda Herrensmith, Individually and as Mother and Administratrix of the Estate of Troy E. Cilone:

(a) Funeral Expenses (Not to exceed $8951.50) $ 8,951.50

(b) Damage to the Estate resulting from the destruction of Troy Cilone's power to labor and earn money. (Not to exceed $2 Million). $ 790,800

(c) Fair and reasonable compensation to Melinda Herrensmith for her loss of affection and companionship of Troy Cilone from the date of death until he would have been 18 years of age. (Not to exceed $500,000.00). $ 250,000

/s/ [Illegible]
Foreperson (If Unanimous)

VERDICT FORM E

We, the jury, find for hte Plaintiffs and against the Ford Motor Company under Instruction No. Five and award damages as follows:

I. For William Franklin Fulkerson.

(a) Mental and physical pain and suffering including that which he is reasonably certain to endure in the future. (Not to exceed 1,000,000)	$ 750,000
(b) Lost wages and permanent impairment as his power to labor and earn money. (Not to exceed 180,006).	$ 155,000
(c) Reasonable expenses incurred for hospital and medical services, medicine and medical supplies. (Not to exceed 74,274).	$ 74,247
(d) Future and reasonably probable medical expenses. (Not to exceed 70,000).	$ 70,000
Total Award. (Not to exceed 1,324,280).	$1,049,274

/s/ [Illegible]
Foreperson (If Unanimous)

VERDICT FORM F

We, the jury, find for the plaintiff, Pauline Fulkerson against the defendant, Ford Motor Company under Instruction No. Six and award damages as follows:

I. For Pauline Fulkerson

(a) For loss of the consortium, society, companionship, conjugal affection, fellowship and assistance of William Franklin Fulkerson, her husband. (Not to exceed $500,000.00) $250,000.00

/s/ [Illegible]

Foreperson (If Unanimous)

VERDICT FORM G

We, the jury, having found for the plaintiffs under Instruction No. Seven against Ford Motor Company, and being satisfied from the evidence that the accident was caused by gross negligence on the part of Ford Motor Company, award punitive damages to the plaintiffs against Ford Motor Company as follows:

For Melinda Herrensmith, Administratrix of the Estate of Troy E. Cilone. (Not to exceed $2,000.000.00)	$2,000,000.00
For William Franklin Fulkerson. (Not to exceed $2,000,000.00)	$2,000,000.00

John Cadden
Gary Alvey
Mark Abromavage
Donna Lynch
Regina Summers
Carol Williams
Kathryn L. White
Tammy A. Murphy
Woodward German"

APPENDIX B

411.184. Definitions—Punitive damages—Proof of punitive damages.—(1) As used in this section and KRS 411.186, unless the context requires otherwise:

(a) "Oppression" means conduct which is specifically intended by the defendant to subject the plaintiff to cruel and unjust hardship.

(b) "Fraud" means an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the plaintiff.

(c) "Malice" means either conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm.

(d) "Plaintiff" means any party claiming punitive damages.

(e) "Defendant" means any party against whom punitive damages are sought.

(f) "Punitive damages" includes exemplary damages and means damages, other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future.

(2) A plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.

(3) In no case shall punitive damages be assessed against a principal or employer for the act of an agent or employee unless such principal or employer author-

ized or ratified or should have anticipated the conduct in question.

(4) In no case shall punitive damages be awarded for breach of contract.

(5) This statute is applicable to all cases in which punitive damages are sought and supersedes any and all existing statutory or judicial law insofar as such law is inconsistent with the provisions of this statute. (Enact. Acts 1988, ch. 224, § 2, effective July 15, 1988.)

APPENDIX C

411.186. Assessment of punitive damages.—(1) In any civil action where claims for punitive damages are included, the jury or judge if jury trial has been waived, shall determine concurrently with all other issues presented, whether punitive damages may be assessed.

(2) If the trier of fact determines that punitive damages should be awarded, the trier of fact shall then assess the sum of punitive damages. In determining the amount of punitive damages to be assessed, the trier of fact should consider the following factors:

(a) The likelihood at the relevant time that serious harm would arise from the defendant's misconduct;

(b) The degree of the defendant's awareness of that likelihood;

(c) The profitability of the misconduct to the defendant;

(d) The duration of the misconduct and any concealment of it by the defendant; and

(e) Any actions by the defendant to remedy the misconduct once it became known to the defendant.

(3) KRS 411.184 and this section are applicable to all cases in which punitive damages are sought. (Enact. Acts 1988, ch. 224, § 3, effective July 15, 1988.)

APPENDIX D

EXCERPTS FROM UNOFFICIAL TRIAL TRANSCRIPT

January 22, 1993, Tape No. 13; 10:11:52

MR. GRUBBS: The damages instructions describe the amount of money that is claimed. And I say claimed because I have heard in the past jurors sometimes look at the dollar figures that are put in the instructions and thought, well maybe that it's somehow recommended by the court. It is not, it is a figure that the attorneys pick, the attorneys for the Plaintiffs, and this is the amount that they claim. It is what they—the highest they would hope they could ever recover. * * *

* * * *

Instruction number seven is a punitive damages instruction. And punitive damages are given in cases by civil juries as a form of punishment where there has been outrageous conduct. Where there has been just such a complete reckless disregard for the life, for the lives of people, that there ought to be a civil punishment imposed in addition to compensatory damages. Compensatory damages are simply damages which are fixed by the jury to make the person whole for the losses that they have sustained. Punitive damages are on top of that. They are only given in the discretion of the jury where it can conclude not to give them for any reason. In this particular case, I think the jury should realize that in light of the testimony and in light of the experience, there is simply no way that the conduct of Ford Motor Company could ever be considered outrageous, reckless, wanton, malicious, those types of things. You'll never reach this instruction, you'll never need to reach this instruction, if you find for the Defendant, Ford Motor Company under instruction number one. You'll conclude that the wheel came off before hand, you should never reach the question of punitive damages. * * *

* * * *

Now, the other thing that I would point out to you about damages is that as we discussed very early in this case during voir dire examination. Damages must be fair and reasonable. That means that they must be fair to both sides and they must not be given as a result of compassion or prejudice or out of sympathy and you as jurors in this case indicated to us that you could put aside sympathy. Sympathy to mean all people, Mr. & Mrs. Fulkerson and Mrs. Herrensmith for their losses and decide this case fairly and objectively on the evidence and not on sympathy. Often times a lawyer will say, well I don't want sympathy, I want justice, but launch into a very emotional argument which is just a design to create sympathy in the minds of the jury. I am confident that you will be true to your own in this case and return a verdict that is not based on sympathy but on facts and the law. * * *

* * * *

January 22, 1993, Tape No. 13; 11:48:00

MR. MILLER: But where you folks can make your voices heard in this case is in the final instruction here which deals with punitive damages. Mr. Grubbs is right, that's punishment. It truly is a punishment. The conduct afforded in this case fully justifies such an award. Gross negligence damages, what could be more gross. Knowing that you have a hazard; knowing that you killed somebody; knowing that you could cause serious injury to somebody, to someone like Frank; and not bothering to warn people you know are out there driving these vehicles, warning anybody of risk. And they knew, the tragic thing is that they knew they had a safe design. Safe proven design, back in 1973 where Bihlmeyer told you, knew that. And they abandoned that. Why does any company do that thing? For money that it saves the company. The duty and care as you heard the witnesses testify, of a manufacturer is if you know of a defect, a manufacturer is supposed to fix it. Period. At a very

minimum, if you can't fix the thing is to warn people that you got a problem. Whatever risk there was, it certainly hit Troy on June 2, 1985. Everything that Troy was, his hopes, his aspirations, his dreams, everything he wanted to be. There's the story just like that. Look what happened to Frank. You folks are the conscience of this community. You folks set the standards of conduct for little folks like me and Melinda, but you also set the standards of conduct for big companies.

MR. GRUBBS: (Interrupting) Your honor, I object to that. That's improper! I ask the court to admonish counsel.

THE COURT: The jury will follow the instructions of the court. . . . Everybody comes before the law on equal basis.

MR. MILLER: You honor is absolutely right. You folks are the conscious of this community and you folks are to set the standard in what you consider reasonable conduct for all of the parties involved here. You can make your voices heard by your verdict that you render in this case. Ford has done wrong in this case the evidence is convincing, conclusive and that's the case. You should tell it by the verdict that they should never, never do that it again. * * *

* * * *

January 22, 1993, Tape No. 13; 12:56:58

MR. SALES: We have asked for punitive damages in this case and we have set two million dollars for the punitive damages. My belief in this is that you should do what you think is appropriate to make sure that this does not happen again. Whether it is a hundred dollars, a hundred thousand, five hundred thousand, a million, it doesn't make any difference. Because to recall this vehicle, over 2 million vehicles, it would cost Ford Motor millions and millions and millions of dollars. But maybe

what you do here, whatever amount you put on punitive damages will send a signal around. Because the purpose of punitive damages is not to reward Frank, or not to reward Ms. Herrensmith for the loss of her son, but it is to hold the wrongdoer up to society and to others who may do the same thing agan. Don't do it. Don't do it. This is a warning, don't. And if you do, you'll pay for it. That's the purpose of punitive damages. It is a social reason. It is to say, we cannot tolerate these things in our society. Don't let it happen again. So whatever you do does nothing more than send out this signal, if it does nothing more than stop that next person from dying, or the next man like Frank Fulkerson from being crippled in his life, then you do what you think is appropriate because that's what's important. It's got to stop today. A warning must be sent. We must find and seek the truth. * * *

* * * *

MOTION FILED

APR 22 1996

(3)

No. 95-1516

In the Supreme Court of the United States

OCTOBER TERM, 1995

FORD MOTOR COMPANY,

Petitioner

v.

WILLIAM FRANKLIN FULKERSON, PAULINE FULKERSON, ALLSTATE INSURANCE COMPANY AND MELINDA HERRENSMITH, INDIVIDUALLY, AS MOTHER OF TROY E. CILONE, INFANT, AND AS ADMINISTRATRIX OF THE ESTATE OF TROY E. CILONE, DECEASED,

Respondents

On Petition for Writ of Certiorari to the Kentucky Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONER

Of Counsel:

HUGH F. YOUNG, JR.
Executive Director
Product Liability Advisory Council, Inc.
1850 Centennial Park Dr.
Suite 510
Reston, Virginia 22091
(703) 264-5300

ANDREW L. FREY*
CHARLES ROTHFELD
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

* *Counsel of Record*

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MOTION FOR LEAVE TO FILE BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b) of the Rules of this Court, *amicus* respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of petitioner. Petitioner has consented to the filing of this brief. This motion is made necessary by the failure of respondents to consent to filing.[1]

Amicus Product Liability Advisory Council, Inc. ("PLAC"), is an association of manufacturing companies that was formed for the principal purpose of submitting *amicus curiae* briefs in appellate cases involving significant issues affecting the law of product liability. PLAC's members, together with other corporations doing business in this country, have borne the brunt of the massive increase in punitive damages verdicts that have occurred over the past two decades. See generally *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 61 (1991) (O'Connor, J., dissenting). PLAC and its members therefore have a particular interest in

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[1] Respondents' counsel indicated that he would not consent to the filing unless *amicus* disclosed in its brief (1) whether Ford Motor Co. is a member of the Product Liability Advisory Council, Inc. ("PLAC"); (2) "[t]he amount that Ford Motor Company or any related entity contributes to the Product Liability Advisory Council, Inc. on a yearly basis and what percentage the amount contributed bears to the total contributions of the organization"; and (3) whether the Ford Motor Co. requested or solicited the filing of PLAC's brief in this case. (The letter containing these demands has been filed with the Clerk of the Court.) While PLAC routinely discloses its corporate membership when making court filings — a list of PLAC's membership is appended to its brief in this case — respondent otherwise has demanded the release of PLAC's internal, confidential information as a condition of its consent.

the development of rules that will assure fundamental fairness in the procedures used to award such damages.

Because *amicus* and its members have a compelling interest in the issues presented in the petition in this case — and because they have experience in the operation of punitive damages regimes used by States across the Nation — they seek leave to file this brief to assist the Court in its consideration of the petition for certiorari in this case.

Respectfully submitted,

Of Counsel:

HUGH F. YOUNG, JR.
Executive Director
Product Liability Advisory Council, Inc.
1850 Centennial Park Dr.
Suite 510
Reston, Virginia 22091
(703) 264-5300

ANDREW L. FREY*
CHARLES ROTHFELD
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

* *Counsel of Record*

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QUESTIONS PRESENTED

Amicus will address the following questions:

1. Whether the Due Process Clause of the Fourteenth Amendment permits the use of jury instructions that offer the jury no meaningful guidance in setting the amount of punitive damages, in a jurisdiction where judicial review of punitive damages verdicts is substantially more deferential than that considered in *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991).

2. Whether, in States where juries are given no meaningful guidance in setting the amount of punitive damages and in which judicial review of punitive verdicts is highly deferential, the Due Process Clause of the Fourteenth Amendment requires proof of a punitive damages claim by clear and convincing evidence.

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BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The interest of the *amicus* is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

This Court should grant review to determine whether it is consistent with the Due Process Clause for a State to permit the award of punitive damages where the jury instructions provide no meaningful guidance as to the amount of any award, and where the State also provides for only the most deferential judicial review of the size of punitive verdicts. The pattern instructions in at least 15 States tell the jury no more than that punitive damages are designed to punish and deter; jurors are not so much as given a list of considerations that may be relevant to setting an amount that will accomplish those purposes. Yet there can be no doubt that such vague and fundamentally contentless instructions — when given to jurors who have no experience in imposing punishment and who lack the information and experience needed to place the defendant's actions in context with other judicial punishments — encourage inconsistent, unpredictable, and often excessive judgments. At the same time, highly deferential, after-the-fact judicial review is not a complete corrective for this problem. Such a regime starts with inflated awards returned by unconstrained juries. The imperative of judicial deference then means that excessive judgments often will survive, and at a minimum it imposes an inexorable hydraulic pressure to increase (and inevitably to overstate) the punishment imposed upon punitive damages defendants.

Review also is appropriate to determine whether a claim for punitive damages must be proved by clear and convincing evidence when the State does not provide the procedural and

substantive protections considered by the Court in *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991). That issue was left open in *Haslip*. See *id.* at 23 n.11. It should be resolved now. A majority of the States have recognized that use of a clear and convincing evidence standard is essential to the preservation of fundamental fairness. And surely, in a State that makes use of procedures less rigorous than those before the Court in *Haslip* — and in which enormous awards accordingly are returned by juries with some regularity — it is particularly important that liability for punitive damages be clearly established.

ARGUMENT

This case presents two recurring issues of enormous importance that have remained unresolved following this Court's decision in *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991). In that case, the Court upheld a procedural regime for the award of punitive damages that had three components. First, the jury, while given wide discretion in choosing a punitive award, was both instructed as to the purposes of punitive damages and told that in fixing the amount of any punitive verdict it was to "'take into consideration the character and the degree of the wrong as shown by the evidence and the necessity of preventing similar wrong.'" *Id.* at 6 n.1 (citation omitted). Second, the amount of any punitive judgment was scrutinized by the trial court in light of a detailed list of considerations relevant to setting an appropriate punishment. *Id.* at 20. And third, the Alabama Supreme Court "provide[d] an additional check on the jury's or trial court's discretion" by "undertak[ing] a comparative analysis" and then applying "detailed substantive standards it has developed for evaluating punitive awards." *Id.* at 20-21. The Court found that this "full panoply of Alabama's

procedural protections" accords due process to defendants in punitive damages cases. *Id.* at 23.[1]

The Court, however, did not decide whether a procedural system for the award of punitive damages is constitutional where one or more elements of this "full panoply" are missing. That issue is squarely presented here. In Kentucky at the time that this case was decided — and in many other States still today — the jury instructions concerning the amount of punitive damages provided *less* guidance than those in *Haslip*, while neither of the other *Haslip* procedural protections were available. We submit that review to resolve the constitutionality of such a regime is essential: "many courts continue to provide jurors with skeletal guidance that permits the traditional guarantor of fairness — the jury itself — to be converted into a source of caprice and bias." *TXO Production Corp.* v. *Alliance Resource Corp.*, 113 S. Ct. 2711, 2742 (1993) (O'Connor, J., dissenting).

The petition in this case also presents a second important and closely related issue. In *Haslip*, the Court left open the question whether it is consistent with the Due Process Clause for a State to permit a jury to find a claim for punitive damages established by a simple preponderance of the evidence in cases where the defendant is not afforded the other "procedural and substantive protections" provided by Alabama. 499 U.S. at 23 n.11. Yet as many States have recognized, a plaintiff must be required to prove the elements of a claim for punitive damages by clear and convincing evidence if fundamental fairness is to be preserved. Whether a jury may be permitted to award punitive damages under a preponderance standard when the jury's discretion in setting

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[1] Of course, subsequent experience — including the endless stream of certiorari petitions challenging the shocking punitive judgments that are routinely affirmed by the Alabama courts — suggests that the Alabama system does not work as advertised.

the amount of such an award is essentially unconstrained accordingly warrants review.

A. The Question Whether A State May Permit Punitive Damages To Be Imposed Under Jury Instructions That Provide No Meaningful Guidance, And Then Afford Highly Deferential Judicial Excessiveness Review, Is Important And Recurring

1. The question whether juries must be given punitive damages instructions that meaningfully channel their discretion is one of great currency. While Kentucky has prospectively modified the "bare-bones" regime that was in place when this case was tried, juries in many other States are affirmatively instructed that they may exercise essentially unconstrained discretion in setting punitive awards — and they are given virtually no guidance in doing so. The pattern instructions in at least 15 States tell the jury no more than that punitive damages are designed to punish and deter; jurors are not told what considerations may be relevant to setting an amount that will accomplish those purposes, and are told of no consideration that may *not* properly govern their decisions. Perhaps typical is the instruction in Georgia, where juries are told only that "[t]he measure of [punitive] damages is your enlightened conscience." Georgia Suggested Pattern Jury Instructions, No. 13 (1984).[2] Such instructions are

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[2] States that similarly fail to identify either permissible or impermissible considerations for the jury include Arkansas (Arkansas Model Jury Instructions, Civil (1989)); Colorado (Colorado Jury Instructions, Civil, No. 5.3A (3d ed. 1990)); Idaho (Idaho Jury Instructions, Nos. 921-1, 921-2 (1988)); Illinois (Illinois Pattern Jury Instructions, Civil, No. 35.01 (3d ed., 1990)); Indiana (I Indiana Pattern Jury Instructions, Civil, No. 111.100 (2d ed. 1989)); Missouri (Missouri Approved Jury Instructions, Nos. 10.01, 10.02 (3d ed. 1989)); Montana (Montana Pattern Jury Instructions, Civil, Nos. 25.60A-25.65 (1987)); New Jersey (Model

considerably more harmful even than the "amorphous" charge in *Haslip* (499 U.S. at 48, O'Connor, J., dissenting)), which at least informed the jury that it was obligated to "'take into consideration the character and degree of the wrong as shown by the evidence.'" *Id.* at 19 (citation omitted). If the jurors' "enlightened consciences" tell them that blacks should be punished more than whites, or corporations more than individuals, or foreign citizens more than local ones, these instructions endorse such decision-making. In addition, another nine States make use of jury charges that do not differ materially from the one applied in Alabama; these States offer the jury a handful of relevant considerations and leave it to the jurors to determine how these considerations should be weighed and applied.[3]

Jury Charges, Civil, No. 6.40 (2d ed. 1983)); New York (New York Pattern Jury Instructions — Civil, No. 2.278 (2d ed. 1990)); North Carolina (North Carolina Pattern Jury Instructions for Civil Cases, Nos. 810.00, 810.01 (1986)); North Dakota (North Dakota Pattern Jury Instructions, Civil, Nos. 1260, 1265 (1986)); Oklahoma (6 Vernon's Oklahoma Forms, §§ 7627-7631 (1990)); Virginia (Instructions for Virginia and West Virginia, §§ 26-128, 26-129, 26-130 (3d ed. 1990)); Wyoming (Wyoming Civil Pattern Jury Instructions, No. 4.06 (rev. ed. 1988)).

[3] Alaska Pattern Jury Instructions, No. 20.20 (1990); Recommended Arizona Jury Instructions (Civil), No. 10C (1990) (list of considerations optional); Florida Standard Jury Instructions and Civil Cases, No. 6.12 (1989); Iowa Uniform Jury Instructions Annotated, Civil, No. 3.28 (1990); Maine Manual of Jury Procedures and Instructions, No. 352 (1990); Mississippi Model Jury Instructions, No. 20.10 (1977); Nevada Pattern Jury Instructions, Civil, Nos. 10.20, 10.21 (1986); Pennsylvania Suggested Civil Jury Instructions, Nos. 14.00, 14.02 (1984); South Carolina Recommended Civil Jury Charges, Nos. 14.01, 14.04 (1989); II Wisconsin Civil Jury Instructions, Civil, No. 1707 (1990).

2. There can be no doubt that such vague and fundamentally contentless instructions "encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections" in setting punitive awards. *Haslip*, 499 U.S. at 43 (O'Connor, J., dissenting). Members of the Court repeatedly have expressed concern that this "lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury's verdict." *TXO*, 113 S. Ct. at 2729 (O'Connor, J., dissenting). See *Haslip*, 499 U.S. at 41 (Kennedy, J., concurring in the judgment); *Smith* v. *Wade*, 461 U.S. 30, 88 (1983) (Rehnquist, J., dissenting). As Justice Brennan observed, "[g]uidance like this is scarcely better than no guidance at all. * * * [P]unitive damages are imposed by juries guided by little more than an admonition to do what they think is best." *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 281 (Brennan, J., concurring).

The danger posed by such instructions is manifest. Even in the best of circumstances, juries need considerable guidance to perform their tasks satisfactorily. As the leading scholars of the subject have observed,

> [a] jury is composed of untrained citizens, drawn randomly from the eligible population, convened briefly for a particular trial, entrusted with great official powers, permitted to deliberate in secret, to render a verdict without explanation, and, without any accountability then or ever, to return to private life.

M. Saks, *Jury Verdicts: The Role of Group Size and Social Decision* 6 (1977). Students of the jury thus have found that juries sometimes "consider[] extralegal factors in determining liability and punitive awards" (M. Selvin & L. Picus, *The Debate Over Jury Performance: Observations From a Recent Asbestos Case* ix (1987)), while it seems clear from the work of social scientists that juries "are occasionally biased against corporate defendants." Greene, *On Juries and Damage*

Awards: The Process of Decisionmaking, 52 Law & Contemp. Probs. 224, 246 (1989).[4] And vague punitive damages instructions unnecessarily and unjustifiably *invite* jurors to consider extralegal considerations by failing to tell them what factors may or may not be considered.

Moreover, even the best-intentioned jury, as Blackstone (himself a great defender of the institution) observed more than two centuries ago, may return an incorrect verdict because of "inexperience in business, incapacity, misapprehension, inattention to circumstances, and a thousand other innocent causes." 3 W. Blackstone, *Commentaries on the Laws of England* 389 (1768). After all, "[t]here is no guarantee that members of a particular jury may not be quite unusually ignorant, credulous, slow-witted, narrow-minded, biased or temperamental." G. Williams, *The Proof of Guilt* 272 (3d ed. 1963). It thus is inarguable that juries' decisions "can be shaped by influences impermissible in our system of justice. In fact, they are more susceptible to such influences than judges." *TXO*, 113 S. Ct. at 2728 (O'Connor, J., dissenting). This makes it essential to provide meaningful guidance to the jury.

3. The likelihood of juror error that exists in all cases is greatly increased by the nature of the question posed to the jury when punitive damages are at issue. While juries are thought to be especially effective in making factual determinations that are within the common experience of lay men and women, "determining the amount of punitive damages smells more like sentencing than fact-finding. It does not require answering a 'what happened' question.

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[4] See A. Chin & M. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials* 42-45 (1985) (in personal injury trials, corporate and governmental defendants more likely to be found liable and to be required to pay larger damages); Hans & Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 Law & Human Behavior 151 (1989) (same).

Rather, it embodies the question, 'what ought to happen' to the defendant, an issue typically committed to the judge, not the jury, in a criminal case." Ellis, *Punitive Damages, Due Process and the Jury*, 40 Ala. L. Rev. 975, 1004 (1989).

Indeed, as this Court has noted, "highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties * * * . These are the kinds of calculations traditionally performed by judges." *Tull* v. *United States*, 481 U.S. 412, 427 (1987). "Determining a fair penalty and one that will likely bring about an appropriate level of deterrence, neither too much nor too little, does not invoke a familiarity with what the Court called in *Railroad Co.* v. *Stout*[, 84 U.S. (17 Wall.) 657, 664 (1873),] 'the common affairs of life.' * * * Such a sanction represents an example of those 'issues . . . presented for adjudication which are far removed from commonplace activities and accidents familiar to the man on the street.'" Ellis, *supra*, 40 Ala. L. Rev. at 1006 (footnotes omitted), quoting J. Fleming, *The American Tort Process* 113 (1988).

Jurors judging a punitive damages case thus labor under a significant handicap that derives from the nature of the institution. A jury considers its case in isolation; it lacks the information and experience needed to place the particular defendant's actions in context, and typically has no knowledge of the range of punishments to which comparable wrongdoers have been subjected. A jury is therefore far less able than a judge to devise a sanction that is appropriately proportioned to the relative wrongfulness of the defendant's conduct. See Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 286 (1983); Ellis, *supra*, 40 Ala. L. Rev. at 1007. As a result, a jury will be entirely at sea — and the jury's verdict is likely to be capricious — unless the jury instructions provide truly meaningful guidance.

This is true even in those States where juries are given a brief list of considerations relevant to the selection of a

punishment. Jurors in those States are not told how to weigh the listed considerations or how to balance them against one another. And, of course, the jurors cannot be given expertise in assessing punishments and setting appropriate levels of deterrence. Thus, as one commentator has noted, "[e]ven if some factors [given to the jury as bearing on the punitive damages calculation] are questions of pure fact,"

> the calculation of punitive damages cannot be said to be fact-dependent or meaningfully guided by a standard. Multi-factor approaches to the calculation of punitive damages typically allow the decisionmaker to decide for itself the relative importance of individual factors and to consider other factors as well. The decisionmaker then makes a highly discretionary determination from a wide range of choices.

Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 Geo. Wash. L. Rev. 723, 802 (1993). The vague instructions typically given in so many states accordingly do not serve as a meaningful and effective constraint on the jury's discretion.

4. The difficulty that a jury will have in reaching a correct decision is compounded by a feature of many punitive damages regimes that seems calculated to *induce* an unjustified decision: in many states juries are informed of the defendant's financial condition, plaintiffs' counsel urge the jury to set the punishment directly on that basis, and juries are affirmatively instructed to consider financial condition as a basis for punishment.[5] It has long been a commonplace

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[5] Indeed, in some States the defendant's wealth is the *only* consideration that is called to the jury's attention as bearing on the size of a punitive award. See Arkansas Model Jury Instructions, Civil (1989); Florida Standard Jury Instructions and Civil Cases, No. 6.12 (1988); Idaho Jury Instructions, Nos. 921-1, 921-2 (1988); Wyoming Civil Pattern Jury Instructions, No. 4.06 (rev.

that juries blinded by evidence of the size and financial condition of a wrongdoer and feeling "antipathy to a wealthy, out-of-state corporate defendant" may surrender to "redistributionist impulses." *TXO*, 113 S. Ct. at 2725-2726 (Kennedy, J., concurring in part and concurring in the judgment). This unsurprising temptation means that evidence of wealth "may do more harm than good; jurymen may be more interested in divesting vested interests than in attempting to fix penalties which will make for effective working of the admonitory function." Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1191 (1931). See Abraham & Jeffries, *supra*, 18 J. Legal Stud. at 424; Ellis, *supra*, 40 Ala. L. Rev. at 996.[6]

In *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2341 (1994), the Court accordingly noted that "the rise of large,

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ed. 1988).

[6] Courts generally have permitted consideration of wealth in the assessment of punitive damages (see *TXO*, 113 S. Ct. at 2737-2738 (O'Connor, J., dissenting)), and indeed this practice makes sense in considering what may be needed to deter an *individual* defendant from committing a punishable wrong, especially one that is not economically motivated, and in protecting any type of defendant from economically ruinous punishment. But commentators are virtually unanimous in the view that a *corporate* defendant's "wealth" has *no* rational connection to the setting of an appropriate penalty. See, *e.g.*, Abraham & Jeffries, *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. Legal Stud. 415, 421-422 (1989); Chapman & Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 Ala. L. Rev. 741, 824-826 (1989); Cooter, *Punitive Damages for Deterrence: When and How Much*, 40 Ala. L. Rev. 1143, 1176-1177 (1989); *Symposium Discussion, Punitive Damages*, 56 S. Cal. L. Rev. 155, 190-191 (1982) (comments by Professors Jack L. Carr and Malcolm E. Wheeler). See also *Zazu Designs* v. *L'Oreal, S.A.*, 979 F.2d 499, 508-509 (7th Cir. 1992) (Easterbrook, J.).

interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries." The Court explained that

> [p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.

Id. at 2340-2341. See *TXO*, 113 S. Ct. at 2723 (plurality opinion); *id.* at 2737, 2738 (O'Connor, J., dissenting). The need for instructions that properly channel the jury's discretion therefore is manifest.

5. Common sense thus suggests that unguided juries often will return capricious and excessive awards. But we need not rely on logic to establish that proposition: empirical data demonstrate that trial and appellate judges frequently find it necessary to reduce or remit damages awarded by juries. These actions are significant because every case in which a judge finds an award excessive is one in which the instructions in fact did not succeed in keeping the jury's exercise of discretion within proper bounds.

One recent survey was described to the Court in the petitioner's brief in *Honda*, No. 93-644, at 27-28. This analysis reviewed all reported cases, state and federal, in which punitive damages awards were contested as excessive during 1992 and 1993.[7] In 141 of the 271 cases in the

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[7] The survey sample was constructed by searching the Westlaw electronic database for all cases involving punitive damages that discuss remittitur, reductions, or excessiveness. In technical terms, the search — drawn to be as inclusive as possible — was "punitive or exemplary/50 reduc! or remit! or exces! & da (>1991)." The search was conducted in Westlaw files "allstates" and "allfeds."

sample — or more than 50% — the punitive awards were reduced or set aside altogether on post-trial or appellate review.[8] These findings are consistent with the conclusions of all of the published empirical studies on the subject.[9] This

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[8] Concededly, a survey of reported decisions makes use of a sample that is to some extent biased. Reported decisions are in large measure appellate decisions, and the cases most likely to be appealed are those where the damages awards are the largest (and therefore, presumably, the most likely to be reduced). See generally Landes & Posner, *New Light on Punitive Damages*, Regulation (Sept./Oct. 1986) at 34. On the other hand, such a survey omits the large volume of cases in which awards are reduced by trial courts or are settled at a significant discount while an appeal is pending; there is reason to believe that there are a substantial number of such cases. See *Honda*, 114 S. Ct. at 2341 n.11. Whatever the precise numbers, then, the survey establishes beyond dispute that punitive verdicts returned by juries are erroneous in a great many cases. And to the extent that the survey sample is skewed towards cases involving larger punitive awards, those are, of course, the cases in which the greatest deprivations of property take place.

[9] The most oft-cited empirical study of punitive damages, which was conducted by the RAND Institute for Civil Justice, found that punitive awards were reduced or eliminated in 32 out of a sample of 68 punitive verdicts returned in two jurisdictions between 1979 and 1983. Twenty-one of the 32 awards were reduced through post-judgment settlement. Larger verdicts were much more likely to be reduced; although awards were reduced in just under 50% of all cases, awards where reductions took place "involved nearly 90 percent of the total money at stake." M. Peterson, S. Sarma, & M. Shanley, *Punitive Damages: Empirical Findings* 28 (RAND Inst. for Civil Justice 1987). The study found that "[n]early every large award received some reduction — nine of 10 cases with a punitive award greater than $50,000." *Id.* at 30. Other studies have reached similar results. See U.S. Gen. Acct. Office, Report to the Chairman, Subcomm. on Commerce, Consumer Protection, and Competitiveness, Comm. on Energy and Commerce, House of

state of affairs plainly is unhealthy for the jury system: a regime in which jury awards routinely are set aside is sure to breed cynicism about the punitive damages process. Our argument therefore is not an attack on the jury; to the contrary, we suggest that the values that underlie the jury system are best served by providing the jury with guidance at the outset, rather than by intervening to throw out the jury's decision at the end.

6. In the face of vague jury instructions, due process is not preserved by the availability of judicial review that falls short of virtually de novo redetermination of a proper punishment. In States where the jury's discretion is wholly

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Representatives, *Product Liability, Verdicts and Case Resolution in Five States*, GAO/HRD-89-99 42 (Sept. 1989) (post-trial reductions in 82% of 23 punitive verdicts studied); Wheeler, *supra*, 69 Va. L. Rev. at 288 (of 45 appellate decisions in New York in decade before 1983 addressing punitive damages, punitive awards remitted or reversed in 35); Landes & Posner, *supra*, Regulation 35 (punitive award reversed in six of 10 federal appellate cases addressing punitive damages, and reduced in one); Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes With Empirical Data*, 78 Iowa L. Rev. 1, 54-56 (1992) (of 260 products liability punitive awards between 1965 and 1990, punitive awards were reversed in approximately 23%, reduced in 8.5%, and settled in 39.6%; in the 80 cases settled prior to appeal, 19 plaintiffs settled for no punitive damages and another 17 settled for a reduced award); M. Rustad, *Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts* 30-32 (Roscoe Pound Foundation 1991) (slightly more than half of products liability punitive awards reversed or adjusted downwards in 1970s and 1980s). While these studies do not, for the most part, distinguish between post-verdict decisions setting aside awards on the ground that the jury should not have imposed punitive liability at all and those decisions finding awards excessive, they clearly show that jury instructions are not serving to preclude excessive verdicts.

unconstrained — those where the instructions offer even less guidance than that provided to the jury in *Haslip* — after-the-fact judicial review is not a complete corrective. Whether or not such review can assure that verdicts are kept within the limits of substantive due process, "due process does not simply require that a particular result be substantively acceptable; it also requires that it be reached on the basis of permissible considerations." *TXO*, 113 S. Ct. at 2735 (O'Connor, J., dissenting). Cf. *Santosky* v. *Kramer*, 455 U.S. 745, 757 (1982) ("[r]etrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard"). Yet in States where juries are given no meaningful guidance at all, "courts cannot review whether a jury properly applied permissible factors, because juries are not told which factors are permissible and which are not." *Haslip*, 499 U.S. at 56 (O'Connor, J., dissenting). And surely there is something wrong with a system in which more than 50% of jury awards are set aside or modified; that figure makes plain that the first and most important part of the system for the award of punitive damages is deeply flawed.

Most fundamentally, where vague instructions are combined with judicial review that is less searching than that at issue in *Haslip*, the system cannot withstand constitutional scrutiny. Petitioner demonstrates (at Pet. 15-17) that Kentucky, like most States, provided exceedingly deferential review of the size of punitive awards, asking only whether the verdict shocks the judicial conscience. Such a regime starts with inflated awards returned by unconstrained juries; the imperative of judicial deference then means that excessive judgments often will survive, and at a minimum it imposes an inexorable hydraulic pressure to increase (and inevitably to overstate) the punishment imposed upon punitive damages defendants. It also means that capricious and inconsistent judgments — in which one defendant receives a small (or no) punishment, while an identically situated defendant is

punished massively — routinely will survive judicial review.[10] See *Haslip*, 499 U.S. at 50 (O'Connor, J., dissenting).

Such a system is fundamentally unfair. It surely would be unconstitutional for a State to make use of a regime in which punishments were set at random, with some defendants not punished at all and others punished in the amount of tens of millions of dollars. Even if judicial review reduced the largest of these awards to the greatest amount that was not excessive as a matter of substantive due process, there can be no doubt that the wholly capricious nature of the system would render the State's regime unconstitutional. Yet that is essentially what happens in many States now; unconstrained juries — unpredictably but frequently — return excessive awards, which are reviewed under a highly deferential standard. The Court should grant review to determine the constitutionality of such a system.

B. The Question Whether, In A System With Vague Jury Instructions And Highly Deferential Post-Verdict Judicial Review, Liability For Punitive Damages Must Be Established By Clear And Convincing Evidence Is Recurring And Important

The question whether, in the circumstances of cases like this one, a claim for punitive damages must be proved by clear and convincing evidence also warrants review. In *Haslip*, the Court stated that "[t]here is much to be said in

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[10] That is evident in this case, where the first jury found *for* petitioner and the second returned a *massive award against* petitioner. Such inconsistencies are commonplace in the world of punitive damages. See, *e.g.*, *BMW of North America, Inc.* v. *Gore*, Pet. Br. No. 94-896, at 9 (noting that in two virtually identical cases, one plaintiff received no punitive damages while the other was awarded $4 million, subsequently remitted on appeal to $2 million).

favor of a State's requiring, as many do, * * * a standard of 'clear and convincing evidence' or, even, 'beyond a reasonable doubt," before punitive damages are awarded. 499 U.S. at 23 n.11 (citations omitted). But the Court added that it was not persuaded "that the Due Process Clause requires that much. We feel that the lesser standard prevailing in Alabama — 'reasonably satisfied from the evidence' — *when buttressed, as it is, by the procedural and substantive protections outlined above*, is constitutionally sufficient." *Ibid.* (emphasis added). In Kentucky at the time that this case was decided, and in many other States today, this lesser standard is *not* buttressed by the *Haslip* protections.

Petitioner explains (at Pet. 19-26) why use of a preponderance standard in these circumstances denies the defendant due process, and we will not repeat that argument here. We add only that a majority of the States have recognized that application of a "clear and convincing evidence" standard is essential to preserve fundamental fairness. Twenty-two States have adopted this (or a more demanding) requirement by statute.[11] The highest courts of another

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[11] Ala. Code § 6-11-20(a) (1993); Alaska Stat § 09.17.020 (1994); Cal. Civ. Code § 3294(a) (West Supp. 1996); Colo. Rev. Stat. Ann. § 13-25-127(2) (West 1989) (requiring proof beyond a reasonable doubt); Ga. Code Ann. § 51-12-5.1(b) (Supp. 1995); Ill. Ann. Stat. ch. 735, para 5/2-1115.05(b) (Smith-Hurd 1996) (available on Westlaw); Ind. Code Ann § 34-4-34-2 (Burns 1986); Kan. Civ. Proc. Code Ann. § 60-3701(c) & § 60-3702(c) (Vernon Supp. 1993); Ky. Rev. Stat. Ann. § 411.184(2) (Michie 1992); Minn. Stat. Ann. § 549.20(1) (West Supp. 1996); Miss. Code Ann § 11-1-65(1)(a) (1993); Mont. Code Ann. § 27-1-221(5) (1995); Nev. Rev. Stat. Ann. § 42.005(1) (Michie Supp. 1995); N.J. Stat. Ann. § 2A:15-5.12(a) (West Supp. 1996) (available on Westlaw); N.C. Gen. Stat. § 1D-15 (1995); N.D. Cent. Code § 32-03.2-11(1) (Supp. 1995); Ohio Rev. Code Ann. § 2307.80(A) & 2315.21(C)(3) (Anderson 1991); Okla. Stat. Ann. tit. 23, § 9.1(B),

seven States have done so by means of their common-law authority.[12] These courts have explained that "punitive damages are a form of punishment and can stigmatize the defendant in much the same way as a criminal conviction" (*Masaki*, 780 P.2d at 575), and have required use of an elevated standard of proof "because of [punitive damages'] penal nature and potential for debilitating harm." *Zenobia*, 601 A.2d at 657. While these courts have invoked the common law as well as federal constitutional considerations in reaching this result, the common-law factors they have identified are equally applicable to the due process inquiry. And surely, in a State that makes use of procedures less rigorous than those before the Court in *Haslip* — and in which enormous awards accordingly are returned by juries and upheld on appeal with some regularity — it is particularly important that liability for punitive damages be clearly established.

(C), & (D) (West Supp. 1996); 1995 Or. Laws Ch. 688, S.B. No. 482 (Approved July 19, 1995) (amending Or. Rev. Stat. § 18.540(2) & § 30.925(1) (available on Westlaw); S.C. Code Ann. § 15-33-135 (Law. Co-op Supp. 1995); Tex. Civ. Prac. & Rem. Code Ann. 41.003(a) (West Supp. 1996); Utah Code Ann. § 78-18-1(1)(a) (1992). In addition, Iowa requires proof by a "preponderance of clear, convincing and satisfactory evidence" for punitive damages. *See* Iowa Code Ann. § 668A.1(1)(a).

[12] *Linthicum* v. *Nationwide Life Ins. Co.*, 723 P.2d 675, 680-81 (Ariz. 1986); *Jonathan Woodner Co.* v. *Breeden*, 665 A.2d 929, 932, 938 (D.C. 1995); *Masaki* v. *General Motors Corp.*, 780 P.2d 566, 575 (Haw. 1989); *Tuttle* v. *Raymond*, 494 A.2d 1353, 1363 (Me. 1985); *Owens-Illinois, Inc.* v. *Zenobia*, 601 A.2d 633, 657 (Md. 1992); *Hodges* v. *S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992); *Wangen* v. *Ford Motor Co.*, 294 N.W.2d 437, 457-458 (Wis. 1980).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

HUGH F. YOUNG, JR.
Executive Director
Product Liability Advisory Council, Inc.
1850 Centennial Park Dr.
Suite 510
Reston, Virginia 22091
(703) 264-5300

ANDREW L. FREY*
CHARLES ROTHFELD
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

* *Counsel of Record*

APRIL 1996

APPENDIX

CORPORATE MFMBERS PRODUCT LIABILITY ADVISORY COUNCIL, INC.

3M
ACRISON, Inc.
AlliedSignal, Inc.
Aluminum Co. of America
American Automobile Manufacturers Assn.
American Brands, Inc.
American Home Products Corp.
American Suzuki Motor Corp.
Andersen Corporation
Anheuser-Busch Companies
AT&T/Lucent Technologies Inc.
Atlantic Richfield Co.
Baxter International Inc.
Becton-Dickinson & Company
Beech Aircraft Corporation
BIC Corporation
Black & Decker Corp.
BMW of North America, Inc.
Boeing Company, The
Bridgestone/Firestone, Inc.
Briggs & Stratton
Bristol-Myers Squibb Co.
Brown-Forman Corporation
Budd Co., The
Burroughs Wellcome Co.
C.R. Bard, Inc.
Case Corporation
Caterpillar, Inc.
CBI Industries, Inc.
Chrysler Corporation
Ciba-Geigy Corp.
Clark Material Handling Company
Coca-Cola Co.
Coleman Co., Inc., The
Continental General Tire, Inc.
Corning Incorporated
Dana Corporation
Deere & Company
Dow Chemical Company, The
Eaton Corporation
Eli Lilly and Co.
Emerson Electric Co.
Estee Lauder Cos.
Exxon Corp.
Federal-Mogul Corp.
FMC Corporation
Ford Motor Co.
Freightliner Corporation
Gates Rubber Co., The
General Electric Co.
General Motors Corporation
Goodyear Tire & Rubber Company
Great Dane Trailers, Inc.
Guidant Corporation
Harnischfeger Industries
Hoechst Celanese Chemical Group, Inc.
Hoechst Marion Roussel, Inc.
Honda North America, Inc.
Hyundai Motor America

International Paper Company
Isuzu Motors America, Inc.
Jervis B. Webb Company
Johnson Controls, Inc.
Kaiser Aluminum & Chemical Corporation
Kawasaki Motors Corporation, USA
Kia Motors America, Inc.
Kraft Foods, Inc.
Lorillard Tobacco Company
Mack Trucks, Inc.
Mazda (North America), Inc.
Melroe Co.
Mercedes-Benz of N. America, Inc.
Michelin North America, Inc.
Miller Brewing Co.
Mitsubishi Motor Sales of America, Inc.
Monsanto Co.
Navistar International Transportation Corp.
New United Motors Manufacturing, Inc.
Nissan North America, Inc.
O.F. Mossberg & Sons, Inc.
Otis Elevator Co.
Owens-Corning Fiberglas Corporation
PACCAR Inc.
Panasonic Company
Pentair, Inc.
Pfizer Inc.
Pharmacia and Upjohn, Inc.
Philip Morris Companies, Inc.
Playtex Products Inc.
Porsche Cars North America, Inc.
Procter & Gamble Co.
Raymond Corp., The
RJ Reynolds Tobacco Co.
Rockwell International Corporation
Rover Group, Ltd.
Schindler Elevator Corp.
Sears, Roebuck & Co.
Sherwood, a Division of Harsco Corp.
Simon Access-North America
Snap-on Incorporated
Sofamor Danck Group, Inc.
State Industries, Inc.
Sturm, Ruger and Co., Inc.
Subaru of America
Thomas Built Buses, Inc.
Toro Company, The
Toyota Motor Sales, USA, Inc.
TRW, Inc.
U.S. Tobacco
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Co.
Whirlpool Corp.
White Consolidated Industries, Inc.
Yamaha Motor Corp. USA

No. 95-1516

Supreme Court, U.S.
FILED
MAY 2 1996
CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

FORD MOTOR COMPANY,
Petitioner

-v-

WILLIAM FRANKLIN FULKERSON, PAULINE FULKERSON, ALLSTATE INSURANCE COMPANY and MELINDA HERRENSMITH, Individually, as Mother of Troy E. Cilone, Infant, and as Administratrix of the Estate of Troy E. Cilone, Deceased
Respondents

On Petition For Writ of Certiorari
To The Kentucky Court of Appeals

REPLY BRIEF FOR THE PETITIONER

JOHN M. THOMAS
Office of the General Counsel
Ford Motor Company
Suite 1500
Parklane Towers West
Dearborn, MI 48126
(313)337-2515

MALCOLM E. WHEELER*
Parcel, Mauro, Hultin & Spaanstra, P.C.
Suite 3600
1801 California Street
Denver, CO 80202
(303)292-6400

Counsel for Petitioner
**Counsel of Record*

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STATUTES

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Petitioner Ford Motor Company ("Ford") respectfully submits this reply brief to respond to arguments made by Respondents in their Brief in Opposition ("Opp. Br.").

I. RESPONDENTS' OPPOSITION DOES NOT REBUT FORD'S SHOWING THAT SUMMARY REVERSAL IS WARRANTED

Respondents never claim that the punitive damage instruction given by the trial court in this case informed the jury of the purposes of punitive damages, gave the jury any guidance as to how the appropriate amount of punitive damages should be determined, or provided any of the safeguards of the instruction approved by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991)("*Haslip*"). In short, Respondents never claim that the instruction met the requirements of due process.

Like the Kentucky Court of Appeals, Respondents contend that that the trial court's constitutional error in instructing the jury was cured by counsel's closing arguments. (Opp. Br. at 11-12.) Unlike the Kentucky Court of Appeals, however, Respondents at least acknowledge this Court's decisions in *Taylor v. Kentucky*, 436 U.S. 478 (1978)("*Taylor*"), and *Carter v. Kentucky*, 450 U.S. 288 (1981)("*Carter*"). According to Respondents, those cases are distinguishable because in this case Respondents' counsel agreed with Ford's counsel that the purposes of punitive damages were punishment and deterrence. (Opp. Br. at 11-12.)

This argument ignores the difference between binding instructions from the court and non-binding argument of counsel, a fundamental distinction that underlies the holdings in *Taylor* and *Carter*. In both of those cases, this Court held that "arguments of counsel cannot substitute for instructions by the court." *Taylor*, 436 U.S. at 488-89; *Carter*, 450 U.S. at 304. There was no hint that argument by some lawyers could substitute for constitutionally required instructions while argument by other lawyers could not. On the contrary, this Court stated in *Taylor* that "[i]t was the duty of the *court* to safeguard petitioner's rights,

a duty *only it* could have performed reliably." 436 U.S. at 489 (emphasis added). Further,

> arguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, [record citation omitted], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.

Boyde v. California, 494 U.S. 370, 384 (1990)(citing *Carter*). Thus, the jury was just as free to disregard the arguments of Respondents' counsel as it was to disregard Ford's. Not surprisingly, therefore, decisions by federal courts of appeals in civil and criminal cases are directly contrary to Respondents' argument.[1]

Respondents' contention that the closing arguments of the *plaintiffs'* counsel protected the *defendant's* constitutional rights is especially untenable in this case. Nothing said by the trial court or by Respondents' counsel confined the jury's discretion to punishment and deterrence or precluded the jury from awarding punitive damages for other purposes. Unlike the jury instruction approved in *Haslip*, neither the trial court nor Respondents' counsel told the jury that it was not required to award any punitive damages at all; that the purpose of punitive damages was "not to compensate the plaintiff for any injury"; or that the jury should take into consideration "the character and the degree of the wrong as shown by the evidence." *Haslip*, 499 U.S. 6 n.1.

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[1] *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1262 (10th Cir. 1995)("Although the district court allowed *the parties* to argue the issue of expenses, the arguments of counsel cannot substitute for proper instruction on the issue.")(emphasis added); *United States v. Polowichak*, 783 F.2d 410, 417 (4th Cir. 1986)("We recognize, of course, that counsel for *both the defense and the prosecution* in final arguments to the jury directed the jury's attention to [the proper issue]. But the law is clear that the arguments of counsel cannot substitute for instructions by the court.")(emphasis added).

Unlike the jury instruction requested by Ford in this case, neither Respondents' counsel nor the trial court told the jury that punitive damages should not be awarded for any purpose other than punishment and deterrence; that the amount of punitive damages should not exceed the amount necessary to impose appropriate punishment and deterrence; or that the jury's decision should be based on the relevant factors and not on Ford's size or wealth. (Pet. App. 35a-38a.)

On the contrary, Respondents' counsel emphasized that the jury was the "conscience of the community"; that it was responsible for "set[ting] the standards of conduct for ... big companies"; that it should "send a signal" and "make your voices heard by your verdict"; and that whether it awarded $100 or $2,000,000 "doesn't make any difference." (Opp. Br. App. at 12a-13a.) Thus, unlike instructions from the court imposing upon the jury a binding obligation to ensure that any punitive award was no larger than necessary for appropriate punishment and deterrence, Respondents' counsel implicitly but unmistakably urged the jury to ensure that its punitive award was large enough to be heard by a "big compan[y]" to which even $2 million would be insignificant.

In short, the Kentucky Court of Appeals improperly disregarded this Court's controlling decisions in *Haslip*, *Taylor*, and *Carter*, and it did so in the face of closing arguments from Respondents' counsel designed to exacerbate the danger of an arbitrary award by encouraging the jury to "use [its] verdict[] to express [its] biases against big businesses." *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2341 (1994). Accordingly, if this Court concludes that plenary review is not warranted, summary reversal is imperative to avoid the manifest injustice of a $4 million punitive award that punishes Ford for making its product safer *and* a $600,000 fine that punishes Ford for daring to ask the

Kentucky appellate courts to correct a patent violation of its constitutional rights.[2]

II. RESPONDENTS' OPPOSITION DOES NOT REBUT FORD'S SHOWING THAT PLENARY REVIEW IS WARRANTED

The fundamental issue presented by this case is whether due process allows courts to defer to a jury's assessment of punitive damages, to withhold every item in the "full panoply" of procedural protections endorsed in *Haslip*, and at the same time to permit juries to assess punitive damages based on a mere preponderance of the evidence and guided only by "bare-bones" instructions that in reality provide no guidance at all.[3] Contrary to Respondents' assertion, this issue is not "unique" to Kentucky and will not disappear just because a 1988 Kentucky statute will require more detailed instructions in future Kentucky cases. On the contrary, Ford's petition and the *amicus* brief filed by the Product Liability Advisory Council, Inc. ("PLAC") demonstrate that inadequate jury instructions remain a serious problem in at least half of the states and have created a conflict between the Third and Fourth Circuits.[4] (Pet. at 13-19; PLAC Br. at 4-5.) In

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[2] *See* Ky. Rev. Stat. § 26A.300 (imposing damages of 10% on an unsuccessful appellant in the Kentucky Court of Appeals who unsuccessfully seeks review by the Kentucky Supreme Court).

[3] The only item from Alabama's "full panoply" of procedural protections that was theoretically available in this case was the Kentucky rule that prohibits the jury from considering the defendant's wealth. *Hensley v. Paul Miller Ford, Inc.*, 508 S.W.2d 759 (Ky. 1974). As discussed above (p. 3), however, Respondents' closing argument effectively encouraged the jury to consider Ford's size and wealth, and the trial court refused to instruct the jury not to consider Ford's size and wealth. (Pet. App. 36a, 38a.)

[4] In addition, of course, slightly less than half of the states that allow punitive damages require proof by a mere preponderance of the evidence. A ruling on this issue in the context of traditional, deferential judicial review will provide needed guidance on this issue to lower courts in all of these states.

fact, as PLAC observes, at least 15 states, like Kentucky in this case, use instructions that provide less guidance than the instruction approved in *Haslip*.[5]

In fact, one of the Respondents in this very case--Intervening Plaintiff Allstate Insurance Company ("Allstate")--has already taken a position on punitive damages in this Court that is plainly inconsistent with the position taken in the Brief in Opposition.[6] Allstate (joined by two other organizations) filed an *amicus* brief with this Court in *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), for the express purpose of "expos[ing] the haphazard and capricious manner in which *Haslip* has been implemented." (Allstate Amicus Br. at 1.) According to Allstate, "the vast majority of courts have largely ignored the due process principles articulated in *Haslip*," and as a result the punitive damage system "remains literally out of control." (*Id.* at 5.) Further, according to Allstate, "courts have upheld [a] staggering collection of punishments in disregard of virtually every precept set forth in *Haslip*" and, in particular, "have interpreted *Haslip* to mean that almost any jury instruction on punitive damages will satisfy due process." (*Id.* at 17.) Finally, according to Allstate, "the message of *Haslip* is being misunderstood, ignored or flouted." (*Id.* at 27.)

Thus, at least one of the Respondents in this very case plainly recognizes that this case is *not* unique.[7] The Kentucky Court

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[5] *See* PLAC Brief at 4-5. Most states, unlike Kentucky in this case, at least inform the jury of the purposes of punitive damages. But many states, like Kentucky in this case, fail to inform the jury that it should consider "the character and degree of the wrong as shown by the evidence," a key portion of the instruction approved in *Haslip*. (PLAC Brief at 4-5.)

[6] Allstate claims to take "no position with respect to punitive damages, having been awarded none." (Opp. Br. at (i).)

[7] In fact, the nationwide significance of the issues presented by this case dwarfs the significance of the issue presented in *Oberg*, which involved a truly "unique" Oregon constitutional provision under which Oregon courts had no power to reduce or set aside excessive punitive awards. 114 S. Ct. at 2338. This Court granted certiorari to review that case even though "[e]very other (continued)

of Appeals is far from the only court that has "ignored or flouted" *Haslip* with respect to adequate jury instructions, the only component of due process that this Court has not addressed since *Haslip* was decided and the defendant's most important safeguard against arbitrary awards in any state where "[t]he sanctity of the jury verdict is at the heart of our judicial system." *Hanson v. American Nat'l Bank & Trust Co.*, 865 S.W.2d 302, 311 (Ky. 1993).[8]

III. RESPONDENTS' MERITLESS CHALLENGE TO FORD'S STATEMENT OF THE FACTS NEITHER EXCUSES THE FLAGRANT ERROR BELOW NOR DIMINISHES THE NATIONAL IMPORTANCE OF THE ISSUES RAISED BY THIS CASE.

Respondents apparently hope to excuse the undeniable constitutional error that occurred below and to minimize the importance of this case by raising meritless challenges to Ford's

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State in the Union affords post-verdict judicial review of the amount of a punitive damages award." *Id.*

[8] Respondents, citing *Hensley v. Paul Miller Ford, Inc.*, 508 S.W.2d 759 (Ky. 1974), suggest that Kentucky courts provide a "very detailed post-verdict review" of punitive awards comparable to the Alabama system approved in *Haslip*. (Opp. Br. at 12.) In reality, *Hensley* establishes a very deferential standard of judicial review that is not comparable in any respect to the *quasi de novo* review approved in *Haslip*. Under *Hensley*, (1) "the jury has a wide discretion in awarding punitive damages," (2) "the opinion of a jury has been [properly] regarded as the best means of even a fair approximation" of the amount of punitive damages; (3) "every verdict should be treated prima facie as the result of honest judgment upon [the jury's] part," (4) juries "are the constitutional triers of the facts of a case, and courts should exercise great caution in interfering with their verdicts," and (5) it is the court's duty to reverse a punitive award "where verdicts can be accounted for only upon the theory that they are the result of an improper sympathy, or unreasonable prejudice." *Id.* at 763. Thus, the *Hensley* standard--courts must defer to the jury's award absent improper sympathy or unreasonable prejudice--is similar to the Mississippi and Vermont standards about which this Court expressed concern in *Haslip*. 499 U.S. at 21 n.10. In fact, the Kentucky Supreme Court in *Hensley* suggested that courts should exercise even greater caution in reversing a punitive damage award than in reversing a compensatory award! 508 S.W.2d at 764.

statement of the facts. For example, Respondents assert that Ford's petition "commits the common mistake of reciting the evidence most favorable to its position." (Opp. Br. at 1.) They then recite at length the evidence on which they relied at trial to show that the 1984 Ranger's wheel came off before impact, rather than during impact. (Opp. Br. at 2-4.) But all that Ford's petition said on this point was that "[s]ubstantial physical evidence showed that the wheel had been torn off *during* impact," that the jury at the first trial agreed, but that the result of the second trial was "dramatically different." (Pet. at 2-3.) Ford could have devoted several pages to explaining why Respondents' claim for compensatory damages is contrary to the uncontroverted physical facts.[9] But the conflicting evidence on whether the shrink-fit joint failed before impact is irrelevant to the punitive damage issues presented by the petition. Further, Respondents cannot and do not deny that they presented no evidence that any other shrink-fit joint had ever failed before impact under any circumstances, either before or after the accident in this case.[10]

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[9] For example, Respondents' own metallurgist conceded at the second trial that there were impact "Brinell" marks on the inner race of the Ranger's wheel and that those marks could not have been made had the wheel separated before impact. (TAPE No. 4; 01/08/93; 09:41:45.) Ford's detailed argument for judgment notwithstanding the verdict based on the physical facts is contained in its brief in the Kentucky Court of Appeals and in its memorandum in support of its post-trial motions.

[10] The Kentucky Supreme Court struck Respondents' unsupported assertion that there had been another case in which a Ranger lost its wheel because of a shrink-fit failure. (Pet. App. at 14a.) Apparently to avoid violating this ruling, Respondents assert in the opposition that Ford "knew of other *claims* that the shrink-fit assembly failed." (Opp. Br. at 14 n.14, emphasis added.) But only one other "claim" was even mentioned at trial, *Sherer v. Ford Motor Co.*, and limited deposition testimony from that case was admitted solely for purposes of impeachment and not to prove that the claim was true. (TAPE No. 11; 1/20/93; 14:22:02; TAPE No. 12; 1/21/93; 15:28:30.) Moreover, Respondents themselves recognize that that deposition testimony shows that "the spindle [in *Sherer*] did *not* separate prior to impact." (Opp. Br. at 3 n. 3, emphasis added.) Respondents never even (continued)

Respondents also say that "Ford entirely mischaracterizes the record" by suggesting that their punitive damage claim is based on evidence that Ford made its product safer. (Opp. Br. at 5.) But the principal evidence on which Respondents rely in their brief to show that Ford "knew" of a "risk of wheel separation" are Ford's "product change request forms" and testimony from their expert Bihlmeyer and Ford's expert Varin concerning those forms. (Opp. Br. at 5-6, 13-14.) According to Respondents themselves, the change forms and the related testimony reflect Ford's decision to make the Ranger safer by "redesign[ing] the [Ranger's] wheel assembly to include a secondary retention feature" designed to keep the wheel on even in the event of a shrink fit failure. (Opp. Br. at 6.)

Indeed, at trial, Bihlmeyer made it quite plain that Ford's product change forms were the basis for his testimony that Ford had discovered a safety hazard:

> Q. Okay. And what is the basis for your opinion [that Ford knew that the Ranger was defective]?
>
> A. The basis is many of the documents we've been reviewing, they originally designed it with a [wheel retention feature]. It then was removed, and as an engineer I understand some of the advantages for removing that .... Then there was a discovery that that was a--a safety hazard occurred, then there was a fix process a fix to try to put back in some type of wheel retention ....
>
> Q. Well, none of the documents we've looked at so far says that Ford was trying to fix a--a defect in this stem. How do you come to that conclusion?

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offered any evidence that the accident in *Sherer* was caused by a pre-impact shrink-fit failure.

> A. Well, the PCR's [product change requests] are quite clear that the swage operation was added as a stem retention feature. That was why the change was made.

(TAPE No. 4; 01/08/93; 13:48:56.) Bihlmeyer later repeated his claim that it was the "change documents" that showed Ford's "discovery" of the alleged safety hazard:

> *From reading the change documents*...my opinion is that Ford attempted to save cost and weight [but] discovered that ... the shrink fit is insufficient by itself, there is a safety hazard, and they attempted to carefully and quietly, through their internal documentation, make a fix ... .

(TAPE No. 4; 01/08/93; 13:56:30.)

Given this express testimony from Respondents' own expert, there can be no serious question that Ford is being punished for having made its product safer. Even more importantly, that punishment is being imposed under jury instructions that plainly violate Ford's constitutional right to due process, and it is being imposed by state courts that have inexcusably ignored or flouted this Court's controlling decisions.

IV. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOHN M. THOMAS
Office of the General Counsel
Ford Motor Company
Suite 1500
Parklane Towers West
Dearborn, MI 48126
(313)337-2515

MALCOLM E. WHEELER*
Parcel, Mauro, Hultin & Spaanstra, P.C.
Suite 3600
1801 California Street
Denver, CO 80202
(303)292-6400

Counsel for Petitioner

**Counsel of Record*